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Siegecraft and Surrender: The Law and Strategy of Cities and Targets

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Siegecraft and Surrender: The Law and Strategy of Cities as Targets

MATTHEW C. WAXMAN*

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I. INTRODUCTION

The razing of Jericho; the sack of Magdeburg; the siege of Leningrad; the fire-bombing of Dresden. Ever since civilizations began organizing permanent economic settlements, cities and towns have occupied a central role in warfare and in our images of war. "On almost every page of historical writings," remarked Grotius, "you may find accounts of the destruction of whole cities, or the leveling of walls to the ground, the devastation of fields, and conflagrations."¹ A driving force behind the evolution and development of cities has been defense and security.² As a result, however, cities have become a primary target or object of war, exposing their residents to all the ravages and privations of conflict.

While the targeting of cities has remained a constant in warfare, the political role of cities within the nation-state has shifted. The centralization of authority during the past several centuries made states the primary political unit comprising the international system, while economic development and nationalism made cities integral to the functioning of that modern state. As the strategic significance of cities, and the value military planners place on their protection or capture, has changed, so too have the customs and

1. HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 468 (Francis W. Kelsey trans., 1928) (1646).

2. See Richard Bean, *War and the Birth of the Nation State*, 33 J. ECON. HIST. 203, 207-08 (1973). Max Weber also provides an intriguing account of the origin of cities, arguing that military defenses represented an essential element of urban communities. See MAX WEBER, *THE CITY* 75-80 (Don Martindale & Gertrud Neuwirth trans. & eds., 1958).

international legal norms that govern how cities were to be treated during hostilities.

The recent conflict in the former Yugoslavia casts in stark relief the constantly evolving interplay of the law and strategy of city-attacks. Protracted sieges of barricaded population centers and shellings of low-lying towns from the surrounding hillsides dominated the headlines. Although the conflict generated intense debate in the West about the strength of international humanitarian norms half a century after Nuremberg, scholars have neglected to explore what the strategic logic that drove the conduct of the war portends for the viability of the international regime as a constraint on military operations.

The historical development of cities, strategy, and law cannot be fully understood in isolation. The development of cities, and changes in their political significance within the nation-state, drove strategy; but strategy also spurred certain patterns of urban growth, and therefore influenced the development of cities.³ Legal norms concerning attack and surrender both constrained and, on occasion, reinforced certain strategies aimed at conquering nation-states via the attack or capture of cities. At the same time, the changing role of cities within the nation-state and emergence of military technologies has caused dramatic shifts in these legal regimes. The three evolutions—the historical development of cities, strategy, and law—thus form a triadic structure, each one influencing and influenced by the other two.

An examination of this triadic structure reveals that cities have often served as a medium through which the threat of terror travels. Images of war's destructiveness frequently revolve around the plight of cities, and throughout history war-makers have harnessed these effects to propagate certain strategies. Moreover, this transmission of terror has at various times been *facilitated* by customary or legal regimes.

The Yugoslav conflict presents an extraordinary case for examining this triadic relationship because the warring parties' use of siege methods transposes a style of warfare dominant four centuries earlier onto a modern political and legal canvass. To understand how the triadic relationship played out in the conflict, and how it will likely evolve in the future, it is useful to step back in time and explore how the law and strategy of siege warfare were borne out of early modern European political transformations and

3. See Bean, *supra* note 2, at 207-08.

how they have evolved since then. This paper is therefore organized around three episodes that illuminate the triadic relationship at key moments in this historical evolution: the Duke of Alva's attempt to subdue the Dutch Revolt (1572-1573); General William T. Sherman's march through the Confederate South (1864-65); and the Allied bombing of Germany (1943-45). The paper then applies the observations derived from these episodes to a fourth, more recent episode: Serb efforts to conquer portions of Croatia and Bosnia and Herzegovina (1992-95).

One limitation of this analysis is that its selection of the four campaigns restricts it to instances of "total war"—warfare affecting and requiring the mobilization of the entire nation-state. The purpose is not, however, to use these examples as emblematic of all conflict in their respective eras. Indeed, one of the central themes of this paper is that every era contains episodes that deviate from contemporary ethics and strategic logic. For instance, only a few years after the Allied Coalition went to great lengths to avoid collateral damage of Iraqi cities during Operation Desert Storm,⁴ opposing forces in Bosnia waged wars of terror aimed primarily at residents of major cities, reminiscent in many ways of early modern siege warfare. The campaigns analyzed below have instead been chosen for their emphasis on cities as targets and the rich evidence that exists regarding the normative considerations and theories of warfare held by the wars' architects.

This evidence provides the material from which to rebuild the triadic structure of cities, strategy, and law in each era. Piecing together such evidence provides a picture of how changes in each of these three elements drove changes in the other two. More importantly, it reveals that while the role of the city within the nation-state, and therefore within military strategic thought, has undergone revolutionary transformations during the past several centuries, the same principles and logic embodied in the legal regime have reemerged. Despite a growing humanitarian movement since WWII, the triadic relationship has changed far less than one might expect.

4. See U.S. DEP'T OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR, FINAL REPORT TO CONGRESS 98-100 (1992) [hereinafter CONDUCT OF THE PERSIAN GULF WAR]. But see MIDDLE EAST WATCH, HUMAN RIGHTS WATCH, NEEDLESS DEATHS IN THE GULF WAR 95-128 (1991) (arguing that Allied air attacks resulted in significant numbers of deaths among Iraqi civilians); Ariane L. DeSaussure, *The Role of the Law of Armed Conflict During the Persian Gulf War: An Overview*, 37 AIR FORCE L. REV. 41, 68 (1994).

To those who hold out the recent Rome accords calling for a permanent war crimes tribunal as evidence that legal refinement shapes the conduct of warring parties, this paper offers a competing view. Quite the contrary, the currents of the triadic relationship bode poorly for the present trajectory of international legal development as a shield for non-combatants. Although prosecutorial tribunals for the former Yugoslavia and Rwanda hint at institutionalization of human rights and civilian-protective norms,⁵ the realities of modern armed conflict and the demands of military strategy will, as in centuries past, exert strong pulls on the development of international norms regulating attacks against urban centers.

II. CITIES AS TERRITORY: EARLY MODERN EUROPE AND THE DUKE OF ALVA'S CAMPAIGN THROUGH THE NETHERLANDS

A. *The City in Early Modern Europe*

As Western Europe entered the early modern age (roughly 1500), cities occupied a central role in political organization as well as military strategy. Most major cities represented self-contained political units, with their own administrative institutions and bureaucratic structures. At the same time, however, almost all cities were subordinate to some larger political entity, commanded by monarchical or imperial rule.⁶ This over-arching state would frequently emplace its own loyal magistrates and military garrison to mediate between city and imperial government.⁷

Among the most pressing challenges of imperial rulers was to balance strict control over provinces and cities with sufficient grants of autonomy to maintain local government support. This balance was commonly achieved through systems of "privileges," whereby monarchs granted cities certain forms of independence in return for allegiance and taxes.⁸ The quasi-autonomous role of cities within states can thus be described as one of mutual dependence but also constant tension, as these two levels of political authority competed for control of the cities and their residents.

5. See Aryeh Neier, *A Force for World Justice*, WASH. POST, May 27, 1998, at A17.

6. See CHRISTOPHER R. FRIEDRICH, *THE EARLY MODERN CITY, 1450-1750*, at 44-46 (1995).

7. See CHRISTOPHER DUFFY, *SIEGE WARFARE 254-55* (1979).

8. See FRIEDRICH, *supra* note 6, at 50-53.

"The relation between the towns and the central government was a precarious balance of power."⁹

Failure to manage this tension could spell disaster for imperial rulers.¹⁰ In an era when wars were primarily about territory, security required the acquisition and defense of strategically located regions.¹¹ This was impossible without establishing dominion over major cities and towns. "Greatness of a Citie," observed the early modern Italian scholar Giovanni Botero, "is tearmed not the spaciousnesse of scituation, or compasse of Walls; but the multitude of Inhabitants, and their power."¹² Cities provided armies with food and other resources. Cities provided states with tax revenue to fund these armies. And cities provided defensive infrastructure, retaining fortifications built as far back as the third to fifth centuries.¹³ In sum, warfare in early modern Europe generally turned on controlling more cities than one's enemy.¹⁴

The centrality of cities to military strategy grew dramatically during the sixteenth century as a result of revolutionary changes in military technology. Among the most significant was the proliferation throughout Europe of novel fortification systems, modeled after Italian experiments. The construction of lower, wider walls virtually negated the effectiveness of bombardment. At the same time, protruding outworks, or bastions, created intersecting fields of fire against besieging forces, making direct assault costly and of-

9. MARTIN VAN GELDEREN, *THE POLITICAL THOUGHT OF THE DUTCH REVOLT, 1555-1590*, at 24 (1992) (discussing the political organization of the Dutch Provinces).

10. See, e.g., GEOFFREY PARKER, *THE DUTCH REVOLT* 14 (rev. ed. 1985) (illustrating this tension in the Netherlands). For a primary account of political disputes between city and central authority, see *A Defence and True Declaration of the Things Lately Done in the Low Country, Whereby May Easily Be Seen to Whom All the Beginning and Cause of the Late Troubles and Calamities Is to be Imputed*, 13, 57-58 (1571), reprinted in *THE DUTCH REVOLT* (Martin Van Gelderen trans. & ed., 1993). Evidence suggests that *A Defence and True Declaration* was written by Marnix van St. Aldegonde, a confidant of William of Orange. See Martin Van Gelderen, *Introduction to THE DUTCH REVOLT*, *supra*, at xv.

11. See FRANK TALLETT, *WAR AND SOCIETY IN EARLY-MODERN EUROPE, 1495-1715*, at 18-19 (1992).

12. GIOVANNI BOTERO, *THE CAUSE OF THE GREATNESSE OF CITIES* 1-2 (T. H[awkins] trans., London 1635).

13. See generally Bernard S. Bachrach, *On Roman Ramparts*, in *THE CAMBRIDGE ILLUSTRATED HISTORY OF WARFARE* 64, 64-91 (Geoffrey Parker ed., 1995). "From the reign of the emperor Diocletian (AD 285-305) until the development of firearms in the fourteenth century, the essentials of military organization, strategy, and tactics in Europe display a startling continuity." *Id.* at 64.

14. See FRIEDRICHS, *supra* note 6, at 293.

ten impossible.¹⁵ Although artillery had simultaneously improved, these great engineering feats converted major cities into nearly impenetrable fortresses.

The rapid improvements in city fortification transformed armies and, as a result, catalyzed the centralization of political power over vast territories. The near impregnability of Italian-style fortifications required encirclement and protracted siege of cities to starve them into submission.¹⁶ The Spanish siege of one Dutch seaport, for example, lasted over three years (1601-1604).¹⁷ Such methods, of course, required large numbers of troops. The resulting enlargement of armies in turn entailed massive efforts to keep them fed, requiring greater attention to protecting supply lines. Each enemy city had to be conquered, one at a time, and then garrisoned with loyal troops to prevent repossession by the enemy. Only empires large and wealthy enough to take advantage of economies of scale could hope to compete effectively in this strategic environment.¹⁸

These enormous military requirements, along with the necessary taxation to support them, helped cause cities to fall increasingly under the political fold of states.¹⁹ As noted above, cities had long represented individual political entities within larger imperial ones, though many of the city's privileges vis à vis the state were

15. See DUFFY, *supra* note 7, at 23-42; GEOFFREY PARKER, *THE MILITARY REVOLUTION* 7-13 (1988).

16. See TALLET, *supra* note 11, at 50-53.

17. See DUFFY, *supra* note 7, at 85-89.

18. See generally Bean, *supra* note 2, at 203-21 (arguing that changes in military technology during the fifteenth and sixteenth centuries advantaged centralized states over decentralized ones); see also LEWIS MUMFORD, *THE CITY IN HISTORY* 360-63 (1961) (describing transformations in warfare and their effects on city government). "The need for more costly sinews of war put the cities into the hands of usurious oligarchies that financed the ruler's mischievous policies, lived sumptuously on the profits and loot, and sought to entrench their positions by backing the ensuing despotism." *Id.* at 361. This relationship between military technology and political organization is all the more significant insofar as one might expect rapid development of local fortifications to correlate with declines in central authority. In his *History of Warfare*, John Keegan argues that strongholds, or fortified sanctuaries, "are a product of small or divided sovereignties; they proliferate when central authority has not been established or is struggling to secure itself or has broken down." JOHN KEEGAN, *A HISTORY OF WARFARE* 142 (1993).

19. See Bean, *supra* note 2, at 203-21. The thesis that the requirements of warfare resulted in greater political centralization is discussed in THEODORE K. RABB, *THE STRUGGLE FOR STABILITY IN EARLY MODERN EUROPE* 71 (1975); and TALLET, *supra* note 11, at 188 (noting that warfare "was a crucial — probably indeed *the* crucial — agent of change in the development of the state . . ."). But see RABB, *supra*, at 97-98 (arguing that economic necessity drove centralization).

based on assurances that the city would provide revenue.²⁰ Only cities guaranteed control over their surrounding territory and only cities could generate the financial sustenance of warring states; “[G]rowing bureaucracies made capitals and towns the administrative centers of royal absolutism.”²¹ Siege warfare naturally became the dominant mode of conflict. Pitched battles were rare; instead, state armies targeted cities.²²

The massive stone fortifications ringing sixteenth century cities symbolized the early modern European political order. While imperial rulers expended vast sums to outfit key cities with state of the art fortifications, these very fortifications served as reminders that cities themselves remained self-contained units within states, financially and militarily valuable, but not yet constitutive of nations.

B. *The Laws of Siege Warfare*

Given the pivotal role that cities played in early modern European strategy—the “pattern of siege, relief (most sieges failed with or without a relief force), and either a battle or more likely a phased withdrawal by the besieging force, dominated western warfare for a thousand years”²³—it is not surprising that a well-entrenched legal regime developed to regulate siege warfare. A rigid set of customs directed how a fortified city was to be attacked, how it might respond, and what it might expect if captured.²⁴

Like those of the preceding medieval period, early modern customary rules involved varying degrees of immunity depending on the *timing* of capitulations. That is, the quicker a city’s population or garrison capitulated to a besieging army, the greater immunity from pillage it received.²⁵ This tradeoff was usually governed by mechanical rules—strict customary codes marked the precise time at which surrender could be offered and accepted. Specifically, protocol demanded that an advancing army send to the town a

20. See FRIEDRICHS, *supra* note 6, at 54.

21. PAUL M. HOHENBERG & LYNN HOLLEN LEES, *THE MAKING OF URBAN EUROPE 1000-1950*, at 137 (1985).

22. See PARKER, *supra* note 15, at 16.

23. Bachrach, *supra* note 13, at 64-65.

24. For a discussion of sixteenth century laws of war and their relationship to military strategy, as well as some first-hand accounts of Philip II’s views on them, see generally Matthew C. Waxman, *Strategic Terror: Philip II and Sixteenth-Century Warfare*, 4 WAR IN HIST. 339, 339-47 (1997).

25. See FRIEDRICHS, *supra* note 6, at 294.

summons to surrender. The defending town was then allowed to submit with complete immunity for its garrison and civilian population *up until the moment at which the formal siege commenced*, generally signified by the firing of a cannon.²⁶ If a town refused this initial summons to surrender, no future mercy was guaranteed.²⁷

The forfeit of this immunity privilege did not, however, always condemn a defending city to slaughter. Though the defending garrison generally submitted to the mercy (or lack of it) of the attacking force, agreements were often negotiated between attacking and defending forces that allowed for the peaceful transfer of authority over the town.²⁸ For example, Velazquez' famous painting of *The Surrender of Breda*, at which the Dutch turned over the city to Spanish forces in 1625, depicts the opposing commanders kneeling to each other, with the vanquished Justinus of Nassau ceremoniously handing over the key to the city gates.²⁹

The customary pageantries that accompanied surrender of cities and towns reflected the political stakes involved. For a surrendering city was not merely admitting an invading force; it was ratifying a transfer of sovereign authority.³⁰ As one modern scholar put it: "today's enemy was tomorrow's overlord. The veil of social cohesion which but thinly masked the competing interests of different groups in every community was all too quickly shredded as ultimate loyalties were tested by the demands of military occupation."³¹

26. See JIM BRADBURY, *THE MEDIEVAL SIEGE* 308-17 (1992); M.H. KEEN, *LAW OF WAR IN THE LATE MIDDLE AGES* 120 (1965).

27. See PARKER, *supra* note 10, at 159-60; Geoffrey Parker, *Early Modern Europe*, in *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 40, 48 (Michael Howard et al. eds., 1994).

28. For a description of the similar customs regulating surrender of cities in the seventeenth century, see John W. Wright, *Sieges and Customs of War at the Opening of the Eighteenth Century*, 39 AM. HIST. REV. 629, 631-35 (1934).

29. See JOSE LOPEZ-REY, *VELAZQUEZ' WORK AND WORLD* 75-76 (1968).

30. A wonderful example of such authority transfer is the experience of the small German city of Nördlingen. At the start of the Thirty Years' War, imperial forces garrisoned the city. In 1632, Swedish forces under Gustavus Adolphus captured and garrisoned it themselves. Imperial troops then laid siege to the city in 1634, and it was forced to open its gates to the victorious imperial army. French forces received the city's surrender in 1645, only to yield it to Bavarian occupation. The city underwent yet another reversal of control in 1646, when a Swedish garrison was once again emplaced (and remained there until then end of the war and the signing of the Peace of Westphalia). See CHRISTOPHER R. FRIEDRICH, *URBAN SOCIETY IN AN AGE OF WAR: NÖRDLINGEN, 1580-1720*, at 28-31 (1979).

31. FRIEDRICH, *supra* note 6, at 300.

But, while peaceful transfers of cities through surrender were common, so too were bloody ones. As will be seen below, garrisons were frequently put to the sword as warnings to other obdurate towns. Despite their commitment to humane standards of conduct in warfare, contemporary Spanish theologians like Francisco de Vitoria and Francisco Suarez recognized the sometimes justifiable demonstrative effects of sacking unyielding towns or executing their garrisons.³² This practice of exemplary sacking can be found throughout military history of the period, including Count Tilly's brutal destruction of Magdeburg (1631) during the Thirty Years' War³³ and Oliver Cromwell's devastation of Drogheda (1649) during the English Civil War.³⁴

The very worst treatment was reserved for those towns that, failing to grant entry at all, were successfully assaulted.³⁵ A passage from Shakespeare's *Henry V*, though incorporating poetic license, illustrates the prevailing expectations among towns that, when summoned, refused entry to an invading force:

... [Y]ou men of Harflew,
Take pity of your town and of your people
Whiles yet my soldiers are in my command,
Whiles yet the cool and temperate wind of grace
O'erblows the filthy and contagious clouds
Of heady murder, spoil, and villainy.
If not—why, in a moment look to see
The blind and bloody soldier with foul hand
Defile the locks of your shrill-shrieking daughters,
Your fathers taken by the silver beards
And their most reverend heads dash'd to the walls,
Your naked infants spitted upon pikes
Whiles the mad mothers with their howls confus'd

32. See FRANCISCO DE VITORIA, POLITICAL WRITINGS, 319-21 (Anthony Pagden & Jeremy Lawrance eds., 1991); FRANCISCO SUAREZ, 2 SELECTIONS FROM THREE WORKS 847 (Gwladys L. Williams et al. trans., 1944). This Part draws heavily on sixteenth century Spanish writings, as it is "an incontrovertible fact that nearly all the first works dealing (jointly) with humanitarian law and international law were written by Spanish authors . . ." Sergio Moratiel Villa, *The Spanish School of the New Law of Nations*, 1992 INT'L REV. RED CROSS 416, 417.

33. See Parker, *supra* note 27, at 50.

34. See James Burke, *The New Model Army and the Problems of Siege Warfare, 1648-51*, 27 IRISH HIST. STUD. 1, 8-15 (1990). "The deterrent value of Drogheda certainly hastened the surrender of a number of small garrisons at Dundalk, Trim, Carlingford and Newry." *Id.* at 14. See also Parker, *supra* note 27, at 50.

35. See PERCY BORDWELL, THE LAW OF WAR BETWEEN BELLIGERENTS 22 (1908); BRADBURY, *supra* note 26, at 317-24.

Do break the clouds, as did the wives of Jewry
At Herod's bloody-hunting slaughtermen.
What say you? Will you yield, and this avoid,
Or, guilty in defense, be thus destroy'd?³⁶

Of particular significance is the notion that damage sustained to civilians was deemed the responsibility of the *defender*. The allocation of responsibility echoed in Cromwell's warning, after his brutal sacking of Drogheda, to defenders of the nearby fortress town of Wexford:

Having brought the army belonging to the Parliament of England before this place, to reduce it to its due obedience, to the end effusion of blood may be prevented and the town and country about it preserved from ruin, I thought fit to summon you to deliver the same to me, to the use of the State of England.

By this offer, I hope it will clearly appear where the guilt will lie, if innocent persons should come to suffer with the nocent.³⁷

In shifting responsibility to the defender, the harm befalling noncombatants as a result of a siege—starvation, bombardment, sack—was understood as incidental effects of warfare. According to Vitoria:

[I]t is occasionally lawful to kill the innocent not by mistake, but with full knowledge of what one is doing, if this is an accidental effect: for example, during the justified storming of a fortress or city, where one knows there are many innocent people, but where it is impossible to fire artillery and other projectiles or set fire to buildings without crushing or burning the innocent along with the combatants.³⁸

Similarly, Suarez pronounced that while "innocent persons as such may in nowise be slain, . . . incidentally they may be slain, when such an act is necessary in order to secure victory."³⁹ This is

36. WILLIAM SHAKESPEARE, *HENRY V*, act 3, sc. 3, *quoted in* Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 AM. J. INT'L L. 1, 21, n.110 (1992).

37. Summons from Oliver Cromwell for the Commander-in-Chief of Wexford (Oct. 3, 1649) in 2 THE WRITINGS AND SPEECHES OF OLIVER CROMWELL 135 (Wilbur Cortez Abbott ed., 1939).

38. VITORIA, *supra* note 32, at 315 (emphasis omitted).

39. SUAREZ, *supra* note 32, at 845.

because in seeking victory, "the victor does not really kill, for he is not the cause of the death in an essential, but merely in an incidental sense."⁴⁰ Balthazar de Ayala, a Spanish army judge advocate, further explained that "such things are inevitable in war" and therefore not unlawful.⁴¹ This principle of siege warfare, that the defender bears the risks of incidental harm to its civilian population, reemerges time and again in the laws governing the attack of cities.

Both the methods of siege warfare and the customary law regulating it stemmed from the political relationship of cities to states. Since state authority lay atop individual pillars of city-level authority, all that was necessary to transfer the nominal allegiance of a city was to overthrow or force to capitulate its garrison and reinstall one's own along with loyal magistrates.⁴² Though often condoning brutality, sixteenth century laws of war afforded defending cities a fleeting opportunity to secure mercy. This regime created enormous incentives for cities to surrender quickly. It was these incentives that the Duke of Alva attempted to exploit in his campaign to subdue the Netherlands.

C. *The Duke of Alva and the Dutch Revolt: The Convergence of Law and Strategy*

The revolt of the Low Countries (roughly, modern Belgium and the Netherlands) against King Philip II and his Habsburg rule ignited in 1566. Initially sparked by several hundred noblemen opposed to the Spanish Inquisition, iconoclastic rioting soon burgeoned into a full-blown rebellion.⁴³ Not until eighty years later was the conflict finally resolved, with the northern, Dutch portion gaining independence from Spanish rule.

In 1567 Philip II dispatched the Duke of Alva and a sizable force to quell the rebellion.⁴⁴ The approach of his army, along with his "Council of Blood," which sentenced thousands of rebels to death and confiscated wealthy estates, was often enough to

40. *Id.* at 849.

41. BALTHAZAR AYALA, 2 DE JURE ET OFFICIIS BELLICIS ET DISCIPLINA MILITARI LIBRI III 33 (John Westlake ed. & John Pawley Bate trans., Carnegie Institution 1912) (1582).

42. For examples of such transfer in the Netherlands, see PARKER, *supra* note 10, at 146-47.

43. *See id.* at 68-84.

44. *See id.* at 84-88.

frighten pockets of resistance into submission.⁴⁵ He then went on to defeat a French- and German-supported invasion attempt led by William of Nassau, Prince of Orange.⁴⁶

Despite these initial successes, in 1572 the rebels captured by surprise much of Holland and Zeeland, two northern provinces that included a number of cities protected by Italian-style fortifications. The need to recapture and garrison these towns placed Alva in a quandary: the war was draining Spanish resources (already diverted to battling the Turks in the Mediterranean) so a quick victory was vital, but the defensive position of the rebels made a rapid reconquest almost impossible.⁴⁷

To escape this quandary, Alva turned to a strategy of *terror*, the application of brutal violence against a portion of enemy territory in hope of inducing surrender of the rest. As Alva himself would later plead, following the sacking of one rebellious town, "God grant that the rest may learn from it and that it will not be necessary to carry with them to the end and go from town to town with the army of your Majesty."⁴⁸ Such a strategy required two elements, a threat of violence and incentives to surrender. Because cities controlled territory, they would naturally become Alva's primary object.⁴⁹

To create the necessary threat of terror, Alva's army needed not only an ability to raise the perceived costs of resistance but also the means to transmit that threat in a credible way to other towns. This was a relatively easy task, since Alva's reputation for cruelty quickly circulated throughout Dutch territory following his exemplary sacking of towns.⁵⁰ The more difficult requirement of Alva's strategic terror design was to convey to other towns a credible inducement to surrender. Once the penalties of resistance were made evident, Alva had to offer them some means of avoiding those costs. The key dilemma arising out of Alva's strategy stemmed from an inherent tension between these two elements.

45. See 2 JOHN LOTHROP MOTLEY, *THE RISE OF THE DUTCH REPUBLIC* 126-47 (New York, Harper & Bros. 1862); PARKER, *supra* note 10, at 106-08.

46. See WILLIAM S. MALTBY, *ALBA: A BIOGRAPHY OF FERNANDO ALVAREZ DE TOLEDO, THIRD DUKE OF ALBA 1507-1582*, at 159-81 (1983).

47. See PARKER, *supra* note 10, at 126-140.

48. Letter from Alva to Philip II, *quoted in* MALTBY, *supra* note 46, at 244.

49. During this period, a relatively large proportion of the Netherland population lived in towns. Around 1550, nineteen Netherland towns housed more than 10,000 residents, compared with only four such towns in the entire British Isles. See PARKER, *supra* note 10, at 23.

50. See WILLIAM S. MALTBY, *THE BLACK LEGEND IN ENGLAND* 49-50 (1971).

The more brutally an army demonstrated its penchant for slaughter and blood-thirstiness, the less likely the defending towns might be to believe promises of immunity.

Sixteenth century laws of siege warfare helped solve this dilemma. The customary regime was structured to convey a high price of resistance and an immunity privilege for immediate surrender. In theory, making war more brutal would ultimately result in less brutality; the sack of one town would result in immediate surrender, and therefore the sparing, of other towns. The more terrible siege warfare was, the less often individual sieges would need occur.⁵¹

The Duke of Alva's initial success with his strategy of terror bears out the paradoxical yet efficient nature of these rules. Mechelen, the first town sacked in the 1572 campaign, was ravaged after refusing unconditional surrender to Alva's forces.⁵² As one eyewitness recalled, "the soldiers behaved as if this religious capital of the country were a Muslim city and all the inhabitants barbarians. The desolation was so complete that not a nail was left in a wall."⁵³ Such atrocities, however, prompted the immediate surrender of a handful of nearby towns fearing similar vengeance and bloodshed. Alva welcomed this speedy progress and graciously accepted their surrender.⁵⁴ Several months later, the pattern was repeated: the terrible sack of Zutphen⁵⁵ sped the quick surrender of its neighboring towns.⁵⁶ City after city sought to avoid the rape, killing, and arson that had accompanied the sack of brethren cities by taking advantage of the waivable protection afforded them by legal custom.

Just as his adherence to the legal regime supported Alva's rapid advance, his later disregard for customary rules led to its disintegration. The unraveling of his campaign began with the sack of Naarden towards the end of 1572. Although accounts differ, it ap-

51. This helps explain why theologians like Vitoria, though seeking to ensure standards of humane conduct in warfare, nevertheless saw certain sackings as justified for deterrence purposes. See VITORIA, *supra* note 32, at 320 n.45, 323.

52. See 2 MOTLEY, *supra* note 45, at 407; Parker, *supra* note 27, at 49.

53. Parker, *supra* note 27, at 49.

54. See PIETER GEYL, *THE REVOLT OF THE NETHERLANDS* 119 (1958); MALTBY, *supra* note 46, at 240 ("There could be no doubt that his policy was working. Louvain and Termonde had surrendered on merely hearing of his threats against Mechelen, and when the news of his terrible vengeance spread beyond the confines of Brabant other towns followed suit."); PARKER, *supra* note 10, at 141-42.

55. See 2 MOTLEY, *supra* note 45, at 417.

56. See PARKER, *supra* note 10, at 141-42.

pears that after the town surrendered in return for guarantees of protection, Spanish forces turned around and sacked it anyway.⁵⁷ In early 1573, the obdurate town of Haarlem was similarly given an opportunity to surrender and avoid a sack. Otherwise, royal forces threatened to burn it to the ground.⁵⁸ Opting to submit, Haarlem opened its gates to Alva's forces, whereupon more than 2,000 soldiers and magistrates were coldly executed for their treasonous conduct.⁵⁹ Apparently, Alva's impatience with the slowing progress of his campaign, combined with increasingly vocal dissent within the Spanish court, had overwhelmed any inclination for moderation that Alva may have had.⁶⁰

Intended to induce the surrender of neighboring towns, Alva's overeager displays at Naarden and Haarlem had the opposite effect: they stiffened the resolve of towns still in rebellion. As Cardinal Granville described, "The Duke of Alva now complains that other areas have not surrendered spontaneously, but he should remember that there are soldiers defending the [other] towns who, *fearing the same treatment as the garrison of Haarlem*, will fight until they die of hunger."⁶¹

The erosion of Alva's strategy became evident during the siege of Alkmaar, in late 1573. Having heard of the atrocities at Haarlem, the rebel troops at Alkmaar refused to surrender, despite being heavily out-numbered and out-armed. This came at a particularly difficult time for Spain, which was financially drained and thus unable to pay its own troops in the Netherlands. Royal troops refused their orders to assault the town, forcing the lifting of Alkmaar's siege in October 1573.⁶² The Spanish winning streak was snapped.

Alva had failed to appreciate the convergence of strategic efficiency with the laws of war. "Until [Naarden], terror had been successful because it appeared discriminate—towns that submitted, albeit from a distance, were not sacked."⁶³ He cast off restraints on his forces' behavior without realizing that the legal regime, with its embedded incentives for quick surrender, would

57. See MALTBY, *supra* note 46, at 243-44.

58. See PARKER, *supra* note 10, at 159.

59. See DUFFY, *supra* note 7, at 71-72; 2 MOTLEY, *supra* note 45, at 454-55.

60. See MALTBY, *supra* note 46, at 252-54.

61. Cardinal Granville, *quoted in* PARKER, *supra* note 10, at 160 (emphasis added).

62. See PARKER, *supra* note 10, at 162.

63. MALTBY, *supra* note 46, at 243.

have facilitated, rather than constrained, his strategy of terror. As Grotius observed in his narrative of the events:

The Spaniards were wont, . . . believing these Crueltes were convenient for the accelerating and speeding their victory; when, on the contrary, Experience affirms, that men are overcome by no means so soon as Clemency, when the other doth rather heighten mens spleen and courage, when all trust and hope of Pardon being taken away, they fear the Mischeifs of Peace greater and heavier then those of Warre . . .⁶⁴

The initial success and ultimate failure of Alva's campaign also illustrates the role that cities themselves played as a medium through which the threat of terror traveled. Reports flowing from neighboring towns of discriminate violence fostered submission; tales of wanton barbarism, though, spread faster than advancing armies and hardened resistance as they perfused. Half a century later, during the Thirty Years' War, horrors of the sack of Magdeburg (which had destroyed almost the entire city and killed thousands of inhabitants) similarly spread quickly; nearly 300 printed pamphlets, in various languages, appeared throughout the continent.⁶⁵ Like the early sackings of Alva's 1572 campaign, Magdeburg's fate reinforced the sixteenth century legal order of siege warfare. Magdeburg had initially rejected demands for surrender. As a result, "[t]housands perished but, contrary to the assertions of Protestant polemicists, not through sectarian passion but according to the laws of war reinforced by strategic necessity."⁶⁶

III. CITIES AS NATIONHOOD: SHERMAN'S MARCH THROUGH THE CONFEDERATE SOUTH

A. *Cities and the Nationalization of Warfare*

Alva's mode of warfare, the strategic use of terror, required adherence to an entrenched set of rules governing surrender of cities. His deviance from these rules eroded the very expectations so vital to his design's success. General Sherman's march through the

64. HUGO GROTIUS, *DE REBUS BELGICIS: OR, THE ANNALS, AND HISTORY OF THE LOW-COUNTRY-WARRS* 65 (Thomas Manley trans., London, 1665).

65. See FRIEDRICH, *supra* note 6, at 296.

66. PARKER, *supra* note 27, at 50.

Confederate South (1864-65),⁶⁷ illustrates a different relationship among cities, strategy, and the laws of war. Sherman, too, sought to subdue a vast region, in large part through the spreading of terror. Like Alva, Sherman used cities as a medium through which he transmitted this terror. Unlike his predecessor, however, Sherman's particular method of doing so required his consciously holding the laws of war in abeyance.

Much like Philip II three centuries earlier, President Lincoln and his generals faced the challenge of defeating a well-armed rebellion in possession of immense territory.⁶⁸ The nature of warfare, however, was entirely novel, reflecting in many ways the evolving role of cities within the state and hence within military conflict. Two attributes of modern warfare—the reliance on industrial capacity and the need to mobilize and sustain popular will—would profoundly affect the way military commanders viewed cities as objects of war.

The Civil War was in many ways a battle of resources. Armies of several hundred thousand soldiers and their accompanying artillery required mobilization of entire nations as war economies.⁶⁹ In this respect the North held a distinct advantage, as the northern states possessed ninety percent of American pre-war industry.⁷⁰ Nevertheless, during the course of the war the Confederacy transformed itself from an agrarian to an emerging industrial economy to supply one of the world's largest armies of its time.⁷¹

As one Confederate general described, war had become one "in which the whole population and whole production of a country . . . are to be put on a war footing, where every institution is to be

67. See generally John Bennett Walters, *General William T. Sherman and Total War*, 14 J. S. HIST. 447 (1948) (describing Sherman's Civil War campaigns and theory of warfare). For personal narratives of the campaign, see HENRY HITCHCOCK, *MARCHING WITH SHERMAN* (M.A. DeWolfe Howe ed., Yale Univ. Press 1927) (1864-65); and WILLIAM T. SHERMAN, *MEMOIRS OF GENERAL WILLIAM T. SHERMAN* (new ed., Indiana Univ. Press 1957).

68. See Williamson Murray, *What Took the North So Long?*, in *EXPERIENCE OF WAR* 179-81 (Robert Cowley ed., 1992).

69. See MICHAEL HOWARD, *THE FRANCO-PRUSSIAN WAR* 3-4 (1961); ALLAN R. MILLETT & PETER MASLOWSKI, *FOR THE COMMON DEFENSE* 163-65 (rev. & expanded ed. 1994).

70. Peter Maslowski, *To the Edge of Greatness: The United States, 1783-1865*, in *THE MAKING OF STRATEGY* 205, 235 (Williamson Murray et al. eds., 1994).

71. See RICHARD E. BERINGER ET AL., *WHY THE SOUTH LOST THE CIVIL WAR* 59 (1986). The pre-war modernization of the Southern economy should not be overstated. Despite the fact that the slave economy had modern, capitalist, and even industrial aspects, Southerners in general were hesitant to celebrate these features until after the war. See generally C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH 1877-1913* (1971).

made auxiliary to war, where every citizen and every industry is to have for the time but the one attribute—that of contributing to the public defense.”⁷² The strangulation of individual towns so prominent in early modern Europe was thus replaced by a grand Union blockade of the entire Confederate South.⁷³ The changing nature of warfare in turn placed enormous burdens on cities.

While cities had long been vital to the economic and financial viability of the state and its war efforts, their contribution had previously been additive; the strength of the state equaled the sum of its parts. The interconnectedness and interdependence of the nineteenth century modernizing economy, however, meant that the value of a city could not simply be subtracted without causing adverse and possibly crippling consequences throughout the country.⁷⁴ “[T]he railroad helped to transform local economies into a regional and eventually a national economy,”⁷⁵ and Southern railroad mileage had quadrupled between 1850 and 1860.⁷⁶

Whereas the state previously levied taxes, food, and conscripts from populous fortress towns, the state now depended on cities not only individually but as a larger network of interdependent manufacturing centers. To advocates of Southern urbanization, cities represented more than just isolated pockets of economic modernization. They would bind and propel the entire South into nationhood. As Southern nationalist J.D.B. DeBow declared in 1860: “Once Baltimore, Richmond, Charleston, Savannah, Mobile, and New Orleans will supply all goods foreign and domestic, how easily we might cut off all dependence on the North.”⁷⁷

The Civil War was also a battle of national will, the burden of which again fell heavily on cities. To sustain armies of new magnitude over the course of several years, in the face of nation-wide privations, required that national leaders maintain popular morale. The “nation at arms” model of warfare unleashed by the French

72. MILLETT & MASLOWSKI, *supra* note 69, at 163.

73. *See id.* at 170-71.

74. A map of major Confederate railway lines reveals that cities such as Jackson, Mississippi and Atlanta, Georgia were major transportation hubs, explaining the great attention given them as targets during Sherman's campaigns. *See id.* at 180. The same was true of Mississippi River ports, which were often the sites of major Civil War battles.

75. David Goldfield, *Urban Growth in the South*, in AMERICAN URBAN HISTORY 82, 85 (Alexander B. Callow, Jr. ed., 3d ed. 1982).

76. *See id.* at 84.

77. J.D.B. DeBow, *quoted in* LAWRENCE H. LARSEN, THE RISE OF THE URBAN SOUTH 9 (1985). These views were shared by other prominent antebellum writers such as George Fitzhugh. *See* Goldfield, *supra* note 75, at 84.

Revolution and rise of Napoleon in Europe demanded mobilization of an entire population behind a popular cause.⁷⁸ Following the European example, both the North and South introduced forms of a draft in 1862.⁷⁹ Initially the mobilization of national will seemed to favor the South, as rising sectionalism, revolutionary fervor, and identity as a nation distinct from the Union generated determination and commitment to a common cause.⁸⁰ Indeed, some historians have posited that the emergence of cities themselves proved a nationalizing force by muting the regional differences previously dominant in the Southern states.⁸¹

As loci of large proportions of regional population, cities possessed political influence far greater than their small number would suggest.⁸² In addition, however, the interconnectedness of cities as parts of *nations*, with a shared sense of political and cultural identity, meant that cities could not be considered in isolation, but rather formed part of a larger fabric. As General Sherman himself would declare, "When one nation is at war with another, all the people of the one are enemies of the other"⁸³ Although the countryside, too, would face Sherman's wrath, cities stood as emblems of sovereignty. To increasing numbers of Southerners, cities stood for independence and progress.⁸⁴

The changed political and strategic significance of the city was reflected symbolically in the webs of railways running to, from, and between cities, instead of the walled fortifications of sixteenth century Europe ensuring their isolation. With an integrated national war effort, the entire South would be converted into a besieged city, with the nation as a whole prepared for onslaught. "[T]he distinction between army and nation was dissolved. . . . The nation at war thus became an armed camp—sometimes a besieged fortress—in which every individual felt himself involved in a mighty communal endeavour."⁸⁵

78. See J.F.C. FULLER, *THE CONDUCT OF WAR 1789-1961*, at 33-37 (1961).

79. See MILLETT & MASLOWSKI, *supra* note 69, at 205-10.

80. See *id.* at 168. But see BERINGER ET AL., *supra* note 71, at 64-81 (arguing that "lack of will constituted the decisive deficiency in the Confederate arsenal").

81. See DAVID R. GOLDFIELD, *URBAN GROWTH IN THE AGE OF SECTIONALISM* xxii (1977).

82. See *id.* at xviii.

83. Sherman, *quoted in* Walters, *supra* note 67, at 459.

84. See CHARLES N. GLAAB & A. THEODORE BROWN, *A HISTORY OF URBAN AMERICA* 53-63 (1967); see also *supra* note 77 and accompanying text.

85. HOWARD, *supra* note 69, at 3.

The notion of a nation-wide, as opposed to city-by-city, siege would permeate the minds of military planners throughout the war, with enormous impact on their views of laws of warfare. As the British military theorist J.F.C. Fuller described, "For the nineteenth century this was a new conception, because it meant that the deciding factor in war—the power to sue for peace—was transferred from government to people, and that peace-making was a product of revolution. This was to carry the principle of democracy to its ultimate stage"⁸⁶ This devolution of political control, particularly regarding the decision to surrender, reverberated in changing understandings of the laws of war.

B. *The Lieber Code and Nineteenth Century Customs of War*

While the nature of warfare evolved rapidly during the nineteenth century, the laws of war remained largely inherited from previous eras. As Sherman's campaigns will illustrate, the legal regime in place at the outset of the Civil War proved ill suited for emerging strategic theory, particularly with regard to destruction and surrender of cities.

The Union Army, as well as its Confederate counterpart, drew upon two sources of legal authority: the first military legal manual, referred to since as the Lieber Code,⁸⁷ and customary rules as practiced in Europe. The Lieber Code, a document of 157 articles named after its drafter, Francis Lieber, was promulgated as the Union Army's *General Orders, No. 100: Instructions for the Government of Armies of the United States in the Field*, and spelled out limits on the methods of warfare.⁸⁸

In drafting this code, Lieber attempted to balance military necessities of modern warfare with customary protections afforded civilians and the cities in which they dwelled.⁸⁹ On the one hand, Lieber recognized that the emergence of the modern nation-state had partially blurred the distinction between combatant and non-combatant:

It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized

86. FULLER, *supra* note 78, at 108.

87. General Orders, No. 100, Instructions for the Government of Armies of the United States in the Field, April 24, 1863 [hereinafter Lieber Code], reprinted in RICHARD SHELLY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* 45-71 (1983).

88. See Hartigan, *supra* note 87, at 5-23.

89. See *id.* at 15-16.

units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war. . . . The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.⁹⁰

At the same time, however, this notion of a seamlessness and unity of effort among the citizenry and military agents of the state was tempered by customary practice, which recognized a distinction between the two classes: "Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms."⁹¹

Lieber attempted to reconcile these apparently conflicting views by elaborating the concept of "military necessity." He thus declared, "[m]ilitary necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, *and which are lawful according to the modern law and usages of war.*"⁹²

Herein lay the trouble. The definition of what constitutes "military necessity" or "indispensability" is inherently ambiguous. Its uncertainty, however, had been further clouded by the changing nature of warfare itself. The French Revolution inaugurated the model of entire nations springing to arms—"total industrial and civilian mobilization."⁹³ Note, though, that Lieber viewed military necessity narrowly, as a positive restraint on military methods. That is, if a rule was clear and did not specifically provide for exceptions, then it had to be obeyed; the only legitimate grounds of military necessity were those defined in the laws of war themselves.⁹⁴

Lieber's narrow, positive conception of military necessity resounds in his interpretation of rules governing bombardment of cities:

90. Lieber Code, *supra* note 87, at arts. 20-21.

91. Lieber Code, *supra* note 87, at art. 22.

92. Lieber Code, *supra* note 87, at art. 14 (emphasis added).

93. See William V. O'Brien, *The Meaning of 'Military Necessity' in International Law*, 1 WORLD POLITY 109, 132-33 (1957).

94. See *id.* at 129.

Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.⁹⁵

Lieber hereby envisioned an exception only in cases of bombardment preceding an assault, where protection of one's own troops and the tactical advantage of shock made notification impracticable.⁹⁶

These limits on unannounced bombardment of cities flowed not only from the protections generally afforded unarmed civilians but also from the notion that enemy property ought only to be destroyed if necessary: "The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit."⁹⁷ To understand where Lieber would draw the nineteenth century lines of necessity requires examination of the contemporary norms from which he derived his Code.

The specific regulations of the Lieber Code were refinements of European customary practice, described in two of the most widely cited treatises of contemporary norms, those of Vattel⁹⁸ and Halleck.⁹⁹ Vattel, writing in the latter half of the eighteenth century, remarked that destruction of cities and towns by bombardment:

is an extremity to which we do not proceed without cogent reasons. But it is nevertheless warranted by the laws of war, when we are unable by any other mode to reduce an important post, on which the success of the

95. Lieber Code, *supra* note 87, at art. 19.

96. Cf. Thomas G. Robisch, *General William T. Sherman: Would the Georgia Campaigns of the First Commander of the Modern Era Comply with Current Law of War Standards?*, 9 EMORY INT'L L. REV. 459, 477-78 (1995) (arguing that Sherman's unannounced bombardment would have fallen within the Lieber Code's provisions only if Sherman had planned an imminent assault on Atlanta); J.M. SPAIGHT, *WAR RIGHTS ON LAND* 171 (1911) (arguing that Sherman's bombardment of Atlanta ran contrary to the Lieber code).

97. Lieber Code, *supra* note 87, at art. 22.

98. See E. VATTEL, *THE LAW OF NATIONS* (Joseph Chitty trans., 1867) (1758).

99. See H. W. HALLECK, *INTERNATIONAL LAW; OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR* (1861). Although Halleck was American, his treatise was based largely on European practice.

war may depend, or which enables the enemy to annoy us in a dangerous manner.¹⁰⁰

Relying heavily on the work of Vattel, Henry Halleck, an international legal scholar and the General-in-Chief of the Union Armies at the outbreak of the Civil War,¹⁰¹ similarly invoked limits of “necessity” on the destruction of enemy cities:

[T]he sacking of towns and villages, and delivering them up to a prey to fire and the sword, are terrible remedies, which are often worse than the evil to be removed The general rule by which we should regulate our conduct toward an enemy, is that of moderation, and on no occasion should we unnecessarily destroy his property.¹⁰²

Like Vattel, Halleck proposed overarching standards to regulate destruction, though where he would draw precise lines of impermissibility remained unclear.

These treatises left open the question of what constituted sufficient necessity to destroy a city, especially one that had already surrendered or was undefended. In sixteenth century Europe, official surrender (literally, the handing over of keys to the gates) marked a bright line dividing justified destruction and immunity from pillage. This regime flowed naturally from military strategy that focused on the capture of one city at a time; each city, as a quasi-autonomous political unit, controlled its own destiny. In that era, the opening of a town’s gates was generally sufficient to satisfy the aims of conquering armies.

The sixteenth century logic of siege warfare and its customary regime of surrender would be turned on its head, however, by the onset of *national* warfare. The city now formed a part of a larger whole; the legal norms codified by Lieber did not contemplate the sort of warfare that Sherman envisioned and practiced.¹⁰³

100. VATTEL, *supra* note 98, at 367-68.

101. See HARTIGAN, *supra* note 87, at 2.

102. HALLECK, *supra* note 99, at 465-66.

103. See Robisch, *supra* note 96, at 461.

C. *Sherman's March and the Inversion of Sixteenth Century Surrender Logic*

Upon his rise to supreme commander of U.S. forces,¹⁰⁴ General Ulysses S. Grant resolved to send army-sized raids deep into Southern territory to devastate the Confederacy's logistical base. Moving rapidly and living off the land through which these armies passed would obviate the need to garrison conquered territory.¹⁰⁵

This strategy of economic destruction was embodied in Sherman's attack on Atlanta and his subsequent "March to the Sea" and campaign through the Carolinas.¹⁰⁶ From March 1864 until the conclusion of the war, Major General William T. Sherman served as commander of the Federal Division of the Mississippi.¹⁰⁷ In accordance with Grant's strategic vision, Sherman advanced through Georgia to Atlanta, the major Confederate railway hub and manufacturing center of the southeast region.¹⁰⁸ In addition to Grant's vision of knocking out the enemy's ability to supply its forces, Sherman's campaign incorporated a significant psychological component, for which Sherman acquired his reputation for genius and brutality.¹⁰⁹ In wrecking the Confederacy's economic base, Sherman's methods also sowed terror among the Southern populace to erode Southern morale and support for the war.

After demolishing the capital of Mississippi,¹¹⁰ Sherman and his army of 60,000 troops advanced onto Atlanta. It was there that Sherman committed his most notorious acts: the bombardment of the city without warning¹¹¹ and his subsequent order to evacuate

104. See MILLETT & MASLOWSKI, *supra* note 69, at 229-30.

105. See Maslowski, *supra* note 70, at 238-39.

106. See Robisch, *supra* note 96, at 461.

107. See 1 SHERMAN, *supra* note 67, at 401.

108. Both the North and the South relied heavily on improved communication and transportation systems to produce and move the industrial resources so necessary to modern armies. See BERINGER ET AL., *supra* note 71, at 105. Military planners therefore viewed cities like Atlanta, both a manufacturing center as well as a major railway hub, as vital to the logistical viability of the South's national war effort. See Robisch, *supra* note 96, at 461.

109. See, e.g., Jeffrey F. Addicott, *Operation Desert Storm: R.E. Lee or W.T. Sherman?*, 136 MIL. L. REV. 115, 122 (1992) ("The wanton destruction and theft of nonmilitary property that resulted from that campaign arguably marked Sherman as one of the most infamous figures in American military history.").

110. See MARK GRIMSLEY, *THE HARD HAND OF WAR: UNION MILITARY POLICY TOWARD SOUTHERN CIVILIANS 1861-1865*, at 159 (1995); Walters, *supra* note 67, at 468.

111. See Robisch, *supra* note 96, at 467.

and burn it.¹¹² Following the destruction of Atlanta, Sherman led his famous "march to the sea" to further cripple Georgia's economy, terminating in the capture of Savannah.¹¹³ Though aimed primarily at manufacturing centers, Sherman sought to terrorize the citizenry as well—"I can make this march and make Georgia howl."¹¹⁴ Finally, Sherman turned northward and laid waste to much of South Carolina,¹¹⁵ a venture that culminated with the surrender and subsequent burning of Columbia.¹¹⁶

Sherman's actions stemmed from his belief in "total war," or the idea that war pits not only competing military forces but competing societies.¹¹⁷ Like Alva, Sherman exploited the psychological effects of terror aimed at civilian populations to achieve political objectives. As one contemporary South Carolinian explained: "The destruction of Atlanta, the pillaging and burning of other towns of Georgia, and the subsequent devastation along the march of the Federal army through Georgia, gave sufficient earnest of the treatment to be anticipated by South Carolina"¹¹⁸

But, as noted earlier, the territorial wars of the sixteenth century necessarily focused on the capture and holding of fortified cities. Failure to gain control of key strongpoints and to station friendly forces to guard them left an advancing army vulnerable to attacks on its supply line and left the town vulnerable to repossession by the adversary. General Sherman, however, completely disavowed such an approach. Occupying and protecting captured cities required expending scarce military resources. Instead, Sherman elected to destroy, rather than hold, cities.¹¹⁹

Take, for example, the unannounced bombardment of Atlanta. As noted earlier, the Lieber Code provided for such action only to

112. See generally JOHN B. WALTERS, *THE MERCHANT OF TERROR* 127-52 (1973) (describing the capture and burning of Atlanta); see also LLOYD LEWIS, *SHERMAN: FIGHTING PROPHET* 410-85 (1958); 2 SHERMAN, *supra* note 67, at 137-267.

113. See Robisch, *supra* note 96, at 503-04; WALTERS, *supra* note 112, at 183-84.

114. Sherman, *quoted in* Addicott, *supra* note 109, at 123 n.29.

115. See 2 SHERMAN, *supra* note 67, at 268-321.

116. A great deal of dispute surrounds who actually burned Columbia, and whether Sherman ordered or condoned its destruction. See generally WM. GILMORE SIMMS, *SACK AND DESTRUCTION OF THE CITY OF COLUMBIA, S.C.* (A.S. Salley ed., 2d ed., Oglethorpe Univ. Press, 1937) (1865) (reporting the events of the surrender and subsequent burning of the city). For conflicting accounts, see *WHO BURNT COLUMBIA?* (Charleston, Walker, Evans & Cogswell, 1873) (reprinting depositions taken in preparation of a trial against Sherman for his alleged burning of the city).

117. See Robisch, *supra* note 96, at 460.

118. SIMMS, *supra* note 116, at 27-28.

119. A notable exception was Savannah, discussed *infra* notes 126-27 and accompanying text.

prepare for a surprise assault. Yet, Sherman never attempted one. In addition, Sherman ordered the evacuation and burning of the city even after the Confederate Army had retreated and Sherman was free to occupy it unresisted.¹²⁰ Sherman's post-war memoirs reveal his intentions to make the city an example to the rest of the South: "I knew that the people of the South would read in this measure two important conclusions: one, that we were in earnest; and the other, if they were sincere in their common and popular clamor 'to die in the last ditch,' that the opportunity would soon come."¹²¹

Vattel, Halleck,¹²² and Lieber¹²³ would likely have deemed such conduct wanton. Sherman's counterpart, Confederate General Hood, described the uprooting of Atlanta's citizens as "transcend[ing], in studied and ingenious cruelty, all acts ever before brought to my attention in the dark history of war."¹²⁴ Confederate President Jefferson Davis wrote of the incident: "Since Alva's atrocious cruelties to the non-combatant population of the Low Countries in the sixteenth century, the history of war records no instance of such barbarous cruelty as that which [Sherman's] order designed to perpetrate."¹²⁵ To them, the city ought first to have been given an opportunity to surrender; following its capitulation, its property ought to have been protected. Sherman, however, calculated the necessity of his actions differently.

The role of cities in the national economy, and, though not yet fully revealed, in warfare, was changing dramatically during the course of the nineteenth century. Yet the laws of war regulating their attack and surrender lagged far behind. Sherman's campaign, and its occasional deviation from seeming patterns, reflects these tensions. Contrast his devastation of Atlanta with his cap-

120. See WALTERS, *supra* note 112, at 127-152.

121. 2 SHERMAN, *supra* note 67, at 111-12.

122. See HALLECK, *supra* note 99, at 427 ("So long as [enemy civilians] refrain from all hostilities, pay the military contributions which may be imposed on them, and quietly submit to the authority of the belligerent who may happen to be in the military possession of their country, they are allowed to continue in the enjoyment of their property. . .").

123. Upon Sherman's advance towards South Carolina, Lieber implored Halleck, "Let Sherman, if such a thing be possible, levy the heaviest contributions, let him lay the yoke of retribution heavy on the offenders of that offending State, but let there not be ruthless burning, killing, violating women by the soldiery." FRANK FREIDEL, FRANCIS LIEBER 357 (1947).

124. Letter from Gen. Hood to Sherman (Sept. 9, 1864), in 2 SHERMAN, *supra* note 67, at 119.

125. 2 JEFFERSON DAVIS, THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT 564 (Sagamore Press 1958) (1881).

ture of Savannah several months later, an exhibition much like that of his early modern European counterparts. Upon reaching the city he issued a warning that one might easily have attributed to Alva or Cromwell:

I have for some days held and controlled every avenue by which the people and garrison of Savannah can be supplied, and I am therefore justified in demanding the surrender of the city I am prepared to grant liberal terms to the inhabitants and garrison; but should I be forced to resort to assault, or the slower and surer process of starvation, I shall then feel justified in resorting to the harshest measures, and shall make little effort to restrain my army¹²⁶

Although this summons was promptly refused, Confederate forces escaped through a gap in Union lines. Rather than laying waste to the evacuated city, Sherman presented it as a "Christmas gift" to President Lincoln.¹²⁷ While a notable instance of restraint, Sherman then turned north towards South Carolina, where he and his forces abandoned those restraints in what would prove the most destructive leg of his annihilation campaign.¹²⁸

Sherman's treatment of Southern cities, though brutal and arguably in violation of prevailing laws of war, harnessed the emergent role that cities then played within a nation, and sought to influence enemy decision making at the national, rather than the city level. Because of their role in sustaining national war efforts, Sherman reasoned that even those cities that did not actively resist the Union Army still contributed to the Southern war effort. Traditional immunities granted unresisting cities, such as those guar-

126. Summons from Sherman to Gen. Hardee, Commander of Confederate Forces in Savannah (Dec. 17, 1864), in 2 SHERMAN, *supra* note 67, at 211.

127. See 2 SHERMAN, *supra* note 67, at 231.

128. See WALTERS, *supra* note 112, at 184-204. Union forces reserved the worst destruction for South Carolina, the first state to secede, whose population they viewed as instigators of the rebellion. See GRIMSLEY, *supra* note 110, at 200-01. As Sherman's forces set out northward, Halleck suggested, "Should you capture Charleston, I hope that by *some accident* the place may be destroyed, and, if a little salt should be sown upon its site, it may prevent the growth of future crops of nullification and secession." Letter from Halleck to Sherman (Dec. 18, 1864), in 2 SHERMAN, *supra* note 67, at 223. Sherman responded: "I will bear in mind your hint as to Charleston, and do not think 'salt' will be necessary. . . . [T]he whole army is burning with an insatiable desire to wreak vengeance upon South Carolina. I almost tremble at her fate, but feel that she deserves all that seems in store for her." Letter from Sherman to Halleck (Dec. 24, 1864), in *id.*, at 227-28.

anteed in early modern Europe, were inconsistent with this view. As Sherman intimated to his general-in-chief, Halleck, in September 1863: "[A]ll who do not aid us are enemies If the people of the South oppose, they do so at their peril; *and if they stand by, mere lookers-on in this domestic tragedy, they have no right to immunity, protection, or share in the final results.*"¹²⁹

Note the divergent underlying logic from that adopted by Alva and his contemporaries, at a time when each city could be considered an isolated and independent unit. While sixteenth century strategists desired, indeed they often depended on, the rapid capitulation of cities seeking to avoid destruction, Sherman wanted to deny cities that very privilege. Instead, cities could only protect themselves by compelling a nation-wide surrender. "If the people raise a howl against my barbarity and cruelty, I will answer that war is war, and not popularity-seeking. If they want peace, *they and their relatives must stop the war.*"¹³⁰ Sherman thus frequently cast aside the credible inducements to surrender so important to sixteenth century siege warfare.

This divergence of strategic thinking reflected the changing political structure of nations and the role of cities within that structure. The independent political authority of cities, so common to the early modern age, was simultaneously centralized in the modern state¹³¹ but also diffused downwards to the democratic populace. As Sherman himself admonished, "... [T]his war differs from European wars in this particular: we are not only fighting hostile armies, but a hostile people, and must make old and young, rich and poor, feel the hard hand of war, as well as their organized armies."¹³² Because cities and their surrounding countryside no longer functioned as quasi-autonomous political units, Sherman adopted an ethical theory premised on collective responsibility: as part of an enemy nation, every city, and every city resident, regardless of resistance, was subject to punishment.¹³³

Sherman's theory of warfare, then, turned the logic of strategy of law of sixteenth century siege warfare upside down. Sherman

129. Letter from Sherman to Halleck (Sept. 17, 1863), in 1 SHERMAN, *supra* note 67, at 339 (emphasis added).

130. 2 SHERMAN, *supra* note 67, at 111 (emphasis added).

131. See MILLETT & MASLOWSKI, *supra* note 69, at 163 ("Massive mobilization required an unprecedented degree of centralized national control over military policy.").

132. Letter from Sherman to Halleck (Dec. 24, 1864), in 2 SHERMAN, *supra* note 67, at 227.

133. See Walters, *supra* note 67, at 462.

did not desire that cities would surrender to his troops to avoid sack, as most towns had done upon the approach of Alva and his army. Quite the contrary, Sherman sought to compel *national* surrender by denying *cities* the opportunity to avoid destruction. In so doing, Sherman embraced the strategic logic that had governed sieges during the early modern era, but he did so at the national level. Just as the Spanish theologians of the sixteenth century argued that the suffering of city residents was the burden that a resisting garrison bore, so too Sherman argued that the entire South had to bear the suffering attributable to the actions of rebels.

Sherman's concept of collective responsibility demonstrates once again the complex interaction of law and strategy with the changing political significance of cities. Sherman's view of cities as components of a national war effort shaped his understanding of the laws of war. Yet, in turn, the view of the laws of war he practiced—no individual or city ought to be guaranteed the right to avoid the horrors of war through their own actions—formed a core component of his strategy to erode national will. Sherman did not merely see legal rules protecting undefended cities as a hindrance; he viewed suspension of those rules, which lagged behind in a pre-national vision of warfare, as a key pillar to his psychological strategy. Erosion of the enemy's national will required transmitting the threat that every city, and its surrounding countryside, was vulnerable until the entire nation surrendered. This required overturning the very surrender immunities so central to previous military eras.

In shedding its fortress walls of previous centuries, the nineteenth century city became increasingly vulnerable to destruction in war, not for lack of fortification but because of its strategic significance as a component of national war effort. In the following case, this phenomenon is taken to the extreme, as entire countries come to resemble great, walled fortresses, while the unprotected cities *within* become the primary targets of war.

IV. CITIES AS NERVE CENTERS: THE ALLIED BOMBING OF GERMANY IN WWII

A. *The Laws of Air Warfare: Were There Any?*

Sherman's campaigns revealed mere glimpses of the vast changes touching military affairs in the latter half of the nine-

teenth century. Because European theorists and jurists tended to discount the American Civil War experience as inapplicable to the more refined European military tradition,¹³⁴ the laws of war regarding the attack and surrender of cities would change little during the late nineteenth and early twentieth centuries. At the same time, the strategic and political significance of cities, as concentrated loci of industrial power and popular will, continued to grow. By the outbreak of World War II, military planners almost universally anticipated the widespread destruction of cities.

Between 1940 and 1945, the United States and Great Britain dropped over 1,500,000 tons of high-explosive and incendiary bombs over Germany, resulting in more than one million civilian deaths or serious injuries.¹³⁵ The majority of these attacks were delivered as part of the Combined Bomber Offensive, set in motion by President Franklin D. Roosevelt and Prime Minister Winston Churchill after their January 1943 Casablanca Conference.¹³⁶ During the next two years, round-the-clock bombardment of urban centers produced great fire-storms across Germany. Although dispute still surrounds the exact number of deaths caused by individual raids, the bombardment of cities such as Berlin, Hamburg, and Dresden left tens or even hundreds of thousands dead, maimed, or homeless.¹³⁷

The Allied air campaign took Sherman's logic to the extreme: The Allies attempted simultaneously to destroy Germany's capacity to wage war by wrecking its industrial production and to erode German morale to the point where its war effort would collapse. Devastating attacks on cities, it was hoped, would compel rapid capitulation at the national level.

While the scale of destruction was of an entirely new magnitude (only to be surpassed by the firebombings of Tokyo and again in August 1945 with the atomic bombings of Hiroshima and Nagasaki) the conduct of the Allied bombing campaign has generally been considered within the bounds of the law of war as understood in the 1940s.¹³⁸ Although the Charter of the Nuernberg International Military Tribunal listed "indiscriminate bombings" as a

134. See MICHAEL HOWARD, *STUDIES IN WAR AND PEACE* 187 (1970).

135. See GEORGE H. QUESTER, *DETERRENCE BEFORE HIROSHIMA* 157-58 (1986).

136. See ROBERT A. PAPE, *BOMBING TO WIN: AIR POWER AND COERCION IN WAR* 257-58 (1996).

137. See MARK CLODFELTER, *THE LIMITS OF AIR POWER* 6 (1989).

138. See W. Hays Parks, *Air War and the Law of War*, 32 *AIR FORCE L. REV.* 1, 53-54 (1990).

war crime, the United Nations War Crimes Commission rejected alleged cases so long as the bombarded cities could be construed as containing military objectives.¹³⁹ One should not read too much into these prosecutorial decisions alone—the Allies could not condemn strategic bombing practices in general without condemning their own behavior—but they nevertheless reflect the centrality of air bombardment in pre- and post-war military thought. In his final report as Chief Counsel for War Crimes at the Nuernberg Trials, Brigadier General Telford Taylor observed that the bombing of cities reflected deliberate policy and “that *aerial bombardment of cities and factories ha[d] become a recognized part of modern warfare as carried on by all nations.*”¹⁴⁰

The predominant view as to why the laws of war prior to WWII failed to limit aerial bombardment of cities holds that changes in the nature of warfare rendered limits on destruction of cities strategically unviable—that the emergence of air power and the increasing reliance on the homefront to sustain a war effort made aerial bombardment of cities inevitable.¹⁴¹ While this view goes far in explaining why jurists and treaty negotiators failed or refused to develop strict limits on bombardment of cities, it gives inadequate attention to the legal regime that did emerge. The regime that legitimized Allied bombing should be viewed not as an absence of legal development but as the application of a long-established relationship between the targeting of cities and military strategy to a new context, one that essentially embodies the same principles as siege warfare but at a grander scale. To see why, it is necessary to take a step back and pick up international legal development where the previous episode left off.

139. See *id.* at 38

140. TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 65 (1949) (emphasis added).

141. See, e.g., Tami Davis Biddle, *Air Power*, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 140, 157 (Michael Howard et al. eds., 1994) (“The murky laws on aerial bombardment that existed prior to World War II were much too weak to constrain states. . . Strategic bombing was a largely untested idea which seemed to many to hold the promise of making wars shorter, if more violent. Indeed, as we have seen, it was in part this lure, and the concern that other states might gain an advantage, that prevented adequate interwar restraints.”); Parks, *supra* note 138, at 49 (“[N]either governments nor individual citizens placed much faith, if any, in the law of war (if the latter even knew of its existence) to prevent war or the aerial attacks upon the civilian population that were anticipated by all.”).

B. *The Legacy of Nineteenth Century Laws of War and the Experience of the First World War*

A decade after the American Civil War, delegates to the Brussels Convention of 1874 attempted to codify many of the provisions laid out in the Lieber Code. Article 15 of the final document required that "[f]ortified places are alone liable to be besieged. Open towns, agglomerations of dwellings, or villages which are not defended can neither be attacked nor bombarded."¹⁴²

The concept of an "open town"—also referred to as the "open city rule"—reflected European custom, as practiced during the previous century. It allowed a military force defending a city to withdraw in the face of a siege or imminent assault, yielding possession of the city to an attacker unopposed in return for sparing it of further damage.¹⁴³ The 1899 Hague Regulations dropped the reference to "open towns" and provided instead that "[t]he attack or bombardment of towns, villages, habitation or buildings which are not defended, is prohibited."¹⁴⁴

The 1899 rules were replaced the following decade by the 1907 Hague Regulations, which contained virtually identical provisions regarding city attacks.¹⁴⁵ A precise definition of "defended" remained illusive, however. To avoid confusion, the substance of the "undefended places" rule remained that of its predecessor, the "open city" rule; "undefended" cities were again thought to be those that could be occupied immediately by the opposing force without resistance.¹⁴⁶

This doctrine proved ill suited for modern warfare. Notice that the open city rule assumes a mode of combat in which a city is defended and attacked from within its immediate vicinity; declaring a city "open" required that an attacking force be able to *occupy* it in return for granting its immunity. Changes in military technology,

142. Final Protocol of the Brussels Conference of 1874 art. 15, *reprinted in* THE LAWS OF ARMED CONFLICTS 29 (Dietrich Schindler & Jiri Toman eds., 1988) [hereinafter SCHINDLER & TOMAN].

143. See H. Wayne Elliott, *Open Cities and (Un)Defended Places*, 1995 ARMY LAW. 39, 41, 43; *Open Towns*, 1945 BRIT. Y.B. INT'L L. 258, 259.

144. Annex to the 1899 Hague Convention with Respect to the Laws and Customs of War on Land art. 25, *reprinted in* SCHINDLER & TOMAN, *supra* note 142, at 83-84.

145. See *id.* The only significant difference in the language between the two conventions is that the 1907 version prohibits the bombardment of undefended towns "by whatever means," to include aerial bombardment in addition to land attack.

146. See Hamilton DeSaussure, *The Laws of Air Warfare: Are There Any?*, in 4 THE VIETNAM WAR AND INTERNATIONAL LAW 304, 307 (Richard A. Falk ed., 1976); *Open Towns*, *supra* note 143, at 260.

however, would soon erode the style of warfare upon which the rule was predicated and would also render meaningless the once-sharp distinction between "defended" and "undefended" locales. The experience of WWI spelled the open city rule's demise.

First, the stalemate on land generated by the introduction of machine guns, barbed wire, and other innovations replaced the fluid infantry and cavalry attacks of previous eras with static trenchlines extending along "fronts" hundreds of miles long.¹⁴⁷ With a few exceptions, war on the Western Front thus took place far from urban centers. It was the indecisiveness and horrible mass slaughter of trench warfare—the British suffered 60,000 casualties on the first day of their 1916 Somme offensive,¹⁴⁸ with virtually no gain in territory—that led many to view WWI as "The War to End all Wars."

At the same time, advancements in bombardment technology now made cities and other targets far behind these battle lines vulnerable to attack. Air power is, of course, the most obvious of these developments, though advances in the range and destructiveness of artillery also made bombardment of cities by distant land forces a practical possibility.¹⁴⁹ The Germans, for example, shelled Paris with their enormous "Big Bertha" gun from a distance of seventy miles.¹⁵⁰

The need and ability to bombard cities from long range would have tremendous legal ramifications. As one military-legal theorist explained:

The limited capacity of artillery, extending nearly to the twentieth century, localized military operations, restricting them to the immediate ground occupied by the military forces. Out of this grew the idea of an operational zone, or theater of war, within which active combat was supposed to be conducted. It was this operational zone, based on technical performances, and delimited solely by the range of gun fire, which served as a basis for legal

147. See BRIAN BOND, *WAR AND SOCIETY IN EUROPE, 1870-1970*, at 102 (1983).

148. See JOHN KEEGAN, *THE FACE OF BATTLE* 260 (Penguin ed. 1978). By the end of the battle, the British had suffered over 400,000 casualties, the French nearly 200,000. See *id.* at 285.

149. For a discussion of the increased range of artillery during the nineteenth and early twentieth century, see M.W. ROYSE, *AERIAL BOMBARDMENT AND THE INTERNATIONAL REGULATION OF WARFARE* 168-69 (1928); MARTIN VAN CREVELD, *TECHNOLOGY AND WAR* 170-71 (1989).

150. See BOND, *supra* note 147, at 115.

speculation and finally led to attempts at legal definition and regulation.¹⁵¹

Although improvements in artillery first began to erode traditional lines of distinction, it was the advent of manned flight that rendered the nineteenth century legal regime unworkable.

While aircraft were initially employed almost exclusively for reconnaissance and support of tactical maneuvers along the WWI battle lines, both sides soon experimented with their use for "strategic" bombardment—attacks on enemy targets far behind the front lines.¹⁵² After several bombing raids of British cities by German Zeppelin dirigibles beginning in December 1914,¹⁵³ Germany launched its first daylight raid on London with its giant Gotha bombers in June 1917, killing 162 people and sowing widespread public panic.¹⁵⁴ The Allies responded with bombing attacks of their own on German towns and industrial targets.¹⁵⁵ By the time the armistice was signed, the two sides seemed ready to abandon all limits on aerial raiding, and some evidence suggests that the Allies were planning poison gas attacks against Berlin.¹⁵⁶

Strategic air bombardment was hardly a decisive factor in the war. Nevertheless, its potential in future wars attracted the attention of many prominent military planners. General J.C. Smuts, the officer commissioned to study British air defense preparedness, noted in his report that "the day may not be far off when aerial operations with their devastation of enemy lands and destruction of industrial and populous centres on a vast scale may become the principal operations of war, to which the older forms of military and naval operations may become secondary and subordinate."¹⁵⁷

These two transformations in the conduct and capabilities of war, the emergence of "fronts" and the ability to bombard from great distances, placed tremendous strain on the legal regime inherited from the previous century. In particular, they rendered the doctrine of "undefended" places enunciated at the 1899 and

151. ROYSE, *supra* note 149, at 148-49 (citation omitted).

152. See BOND, *supra* note 147, at 115; QUESTER, *supra* note 135, at 20-21, 39-40.

153. See QUESTER, *supra* note 135, at 18-19.

154. See *id.* at 32.

155. See *id.* at 38-46.

156. See *id.* at 44-46.

157. Second Report of the Prime Minister's Committee on Air Organization and Home Defence Against Air Raids (Aug. 17, 1917), reprinted in APPS., H.A. JONES, THE WAR IN THE AIR 8, 10 (1937).

1907 Hague Conferences virtually meaningless by the fact that traditional defensive perimeters of cities hardly existed anymore. Cities were now defended by trench lines hundreds of miles away. The advent of air power clouded the issue in other ways as well. British military planners, for instance, were at odds over the question of anti-aircraft guns: if they chose to protect London from aerial bombardment by installing search lights and artillery to stave off an anticipated attack, did that qualify as "defended," thereby inviting a legal attack from the air? Conversely, could a warring state use a city far behind the front lines as a storage depot for ammunition and military supplies but secure its immunity from bombardment by neglecting to station defending troops there?¹⁵⁸

Technology-driven changes in warfare had outgrown the legal framework regarding attack and surrender of cities inherited from the latter half of the previous century. These changes, however, represent only one dimension of the dramatic shifts in strategy that would propel the Allies' bombing campaign in WWII. The continued industrialization of cities also elevated their importance in the supply of materiel to sustain military operations. The need to mobilize industry on such a large scale made the morale effects on cities of greater import as well. Finally, the perceived fragility of the European political order, and the conception of cities as sites of potential mass uprising, made cities appear the perfect target to air power enthusiasts. The entire triadic relationship among cities, strategy, and law was in flux.

C. *The Twentieth Century City as Nerve Center*

As recounted in Part III, even the earliest blossoming of industrialization in the southern United States transformed the role of cities, and hence their strategic significance, within the state. The character of an emerging manufacturing economy and the proliferation of railroad networks linked major cities inextricably to the economic sustenance of the entire nation. At the same time, the role of cities as concentrated loci of politics and symbols of modernity elevated their prominence as constitutive units of national will.

These early transformations were magnified by the full-blown industrialization of Western Europe during the latter half of the

158. See Elliott, *supra* note 143, at 43; *Open Towns*, *supra* note 143, at 261; Parks, *supra* note 138, at 9, 17-19

nineteenth century.¹⁵⁹ The rapid rise of factory economies throughout Western Europe and the burgeoning of metropolises housing over a million residents¹⁶⁰ tightened the bonds of economic interdependence between cities.¹⁶¹ Stripped of their perimeter walls and political isolation, cities were woven together into an indivisible whole. These structural changes took place before a backdrop of solidifying nationalism, further uniting nations under the banner of common interests and political consciousness.¹⁶²

Sociologists and military planners described the modern state in biological terms; it was an organism with cities as its "nerve centers."¹⁶³ This metaphor captured many of cities' most salient features: Cities formed interlocking webs of economic production; cities played a coordinating function, lending order to national policy; and cities represented conduits of national will. At the same time, the biological metaphors captured the perceived vulnerabilities of this city-state relationship. The same interconnect-edness that generated national wealth and bound citizens to collective ideology could, if disrupted, bring down the entire system.

Even before the experience of WWI, urban transformations, along with the advent of aviation technology, led many theorists to view the city's role in future conflict under new light. In his 1908 account of futuristic warfare, *The War in the Air*, H.G. Wells astutely prophesied that warring states would soon bypass traditional combat altogether. Instead, he surmized they would send great air fleets to bomb major enemy population centers in an effort to sow nation-wide panic and compel immediate surrender.¹⁶⁴ In Wells' eyes, though, such efforts would likely backfire. Rather than forcing quick capitulation at the national level, attacks from

159. See generally HOHENBERG & LEES, *supra* note 21, at 179-214 (describing the economic effects of industrialization on cities).

160. In 1910, there were seven European cities of more than one million inhabitants. By 1940, there were sixteen. See J.M. ROBERTS, *EUROPE, 1880-1945*, at 373 (2d ed. 1989).

161. See HOHENBERG & LEES, *supra* note 21, at 240.

162. See R.R. PALMER & JOEL COLTON, *A HISTORY OF THE MODERN WORLD* 468-72 (7th ed. 1992).

163. See MICHAEL S. SHERRY, *THE RISE OF AMERICAN AIR POWER* 26 (1987). For abundant examples of biological metaphors to describe cities, see JOSEF W. KONVITZ, *CITIES AS TARGETS: CONCEPTIONS OF STRATEGIC BOMBING, 1914-1945*, at app. (Woodrow Wilson Int'l Ctr. for Scholars Working Paper No. 85, 1987).

164. H.G. WELLS, *THE WAR IN THE AIR* (1908).

the sky would fan the flames of mass patriotism, generating endless guerrilla warfare.¹⁶⁵

[W]ith the flying machine war alters in its character; it ceases to be an affair of 'fronts' and becomes an affair of 'areas'; neither side, victor or loser, remains immune from the gravest injuries, and while there is a vast increase in the destructiveness of war, there is also an increased indecisiveness. Consequently 'War in the Air' means social destruction instead of victory as the end of war.¹⁶⁶

Unlike Wells, however, many of those military planners advocating the development of large bomber forces saw the targeting of urban centers as a way to avoid the horrible stalemate of WWI, still fresh in the minds of all Europeans. Giulio Douhet, an Italian officer and perhaps the most influential¹⁶⁷ of the interwar air power advocates, remarked: "[W]e need only envision what would go on among the civilian population of congested cities once the enemy announced that he would bomb such centers relentlessly How could a country go on living and working under this constant threat, oppressed by the nightmare of imminent destruction and death?"¹⁶⁸ Like Wells, Douhet assumed that air warfare flowed naturally and inevitably from the emerging strategic significance of cities as vital organs of the state. For Douhet, however, air warfare would be quick—the threat of massive aerial bombardment alone would generate sufficient pressure to coerce surrender. To those who shared these visions, this logic would dictate the course of future conflict from the moment it erupted:

London will be at once attacked as it was repeatedly on the former occasion in exercise of the enemy's air power. To argue otherwise is lunacy; and . . . to assert that the law of humanity will prevail is to flout precedent in a proceeding which knows no law. . . .

165. *Id.* at 350-75; see also SHERRY, *supra* note 163, at 8-9.

166. H.G. WELLS, *Preface* (1921), in *THE WAR IN THE AIR*, at 5 (New York, MacMillan 1922) (1908).

167. It remains disputed how widely Douhet's writings were read by American air planners. Nevertheless, his ideas, even if not always duly attributed, pervaded American air power theory development during the interwar and WWII period. See CARL H. BUILDER, *THE ICARUS SYNDROME: THE ROLE OF AIR POWER THEORY IN THE EVOLUTION AND FATE OF THE U.S. AIR FORCE* 50-51 (1994).

168. GIULIO DOUHET, *THE COMMAND OF THE AIR* 20-22 (Dino Ferrari trans., Office of Air Force History 1983) (1921).

... The enemy would be acting in strict accordance with the higher strategy, for they would rightly calculate that direct pressure thus applied in wholesale fashion against the spirit of resistance of the masses might break the nation's will to war and induce a hurried peace.¹⁶⁹

Though yet untested in war, the views of sociologists, futurists, and military planners—that aerial bombardment would induce urban social and political collapse—appeared to resonate in events across Europe during the interwar years. With memories of British and French WWI morale problems still lingering, incidents like the British general strike of 1926 and the Paris riots of 1934 seemed to confirm their predictions.¹⁷⁰ The 1917 Russian Revolution frightfully demonstrated cities' potential as sites of mass social uprising,¹⁷¹ and the 1921 Kronstadt mutiny, in the wake of strikes and riots in Moscow and Petrograd, displayed the speed with which instability could spread from city to city.¹⁷²

Certainty about the bomber's efficacy rested on an appreciation of new technology, but also on unquestioned belief in the fragility of modern societies. All the achievements in which Europe once gloried—material wealth, economic interdependence, sophisticated communications—now seemed cause for the gravest worry that the home front had become hopelessly vulnerable.¹⁷³

It was precisely this hopeless vulnerability that American and British air staffs sought to exploit during their interwar planning.¹⁷⁴ Both of their planning efforts viewed cities as defenseless and delicate nerve centers, but their deviations illustrate two popular conceptions of modern cities as nerve centers of the state. Although the conduct of the Allies' respective efforts in WWII eventually converged, American air planners during the interwar period em-

169. L.E.O. CHARLTON, *THE MENACE OF THE CLOUDS* 37-38 (1937).

170. See Davis Biddle, *supra* note 141, at 147; KONVITZ, *supra* note 163, at 5-12.

171. See HOHENBERG & LEES, *supra* note 21, at 283.

172. See generally PAUL AVRICH, *KRONSTADT 1921*, at 35-87 (1970) (detailing the eruption of anti-Bolshevik discontent in major Russian cities and its spread to the military base at Kronstadt). The political writings of Lenin, see, for example, V.I. Lenin, *What Is To Be Done?* (1902), in *LENIN ON POLITICS AND REVOLUTION* 31, 39-40 (James E. Connor ed., 1968), reflect his own observations that social discontent and uprising had a great propensity to spread among cities, which had witnessed considerable industrialization in Russia since the birth of Marxist thought during the previous century. See James E. Connor, *Introduction to LENIN ON POLITICS AND REVOLUTION*, *supra*, at xi, xvii.

173. SHERRY, *supra* note 163, at 26.

174. See KONVITZ, *supra* note 163, at 5-24.

phasized the utility of destroying the enemy's economic and industrial infrastructure. Their British counterparts, by contrast, focused on erosion of enemy civilian morale.¹⁷⁵ Both, however, viewed air attacks on enemy cities as a means to achieve quick victory while avoiding the costly and protracted struggle of recent conflicts.

Plans developed at the U.S. Air Corps Tactical School (ACTS) stressed precision bombardment of key industrial nodes.¹⁷⁶ This planning reflected a vision of modern state economies as "industrial webs" with two-fold strategic implications. First, a well-orchestrated attack on certain critical elements of an adversary's economic system would cause its entire disintegration.¹⁷⁷ Hitting vital industrial targets and key elements of the enemy's economic infrastructure would therefore paralyze its war-making capability.¹⁷⁸ Second, economic collapse through precision bombing would dissolve the civilian population's will to resist, hastening a rapid surrender. As an ACTS lecturer observed in 1936, "A nation's attacking air force would be at liberty to proceed directly to the ultimate aim in war: overthrow of the enemy will to resist through the destruction of those vital elements upon which modern social life is dependent."¹⁷⁹

British planning similarly assumed that strategic bombing would bring about rapid collapse of the enemy's war effort. Their emphasis, however, lay primarily with direct effects on morale. Attacks on entire urban sectors, as opposed to the pinpoint attacks on economic targets envisioned by American planners, would create mass panic, resulting in overthrow of the enemy government.¹⁸⁰ Part of this emphasis on direct morale effects stemmed from British experience during WWI. British Major General Hugh Trenchard, a key architect of the Allied strategic bombing efforts of WWI, claimed confidently after the war, though without scientific basis, that "the moral effect of bombing stands undoubtedly to the material effect in a proportion of 20 to 1."¹⁸¹ In contrast to Ameri-

175. For a comparison of American and British interwar air planning, see PAPE, *supra* note 136, at 60-66; QUESTER, *supra* note 135, at 60-72.

176. See PAPE, *supra* note 136, at 62.

177. See *id.*

178. See Ed Crowder, *Pointblank: A Study in Strategic and National Security Decision Making*, 6 AIRPOWER J. 55, 59 (1992).

179. Lt. Haywood Hansell, *quoted in* CLODFELTER, *supra* note 137, at 2.

180. See PAPE, *supra* note 136, at 61; 1 CHARLES WEBSTER & NOBLE FRANKLAND, *THE STRATEGIC AIR OFFENSIVE AGAINST GERMANY* 26-29 (1961).

181. Gen. Trenchard, *quoted in* 6 JONES, *supra* note 157, at 136.

can plans for precision bombing, British planners stressed the targeting of heavily populated urban "areas."¹⁸²

The two Allied planning efforts, reflecting many of the same assumptions about vulnerability of cities to bombardment and the relationship of industrial cities to the functioning of the state, fed directly into the Combined Bomber Offensive launched in January 1943.¹⁸³ Its stated purpose was "to bring about the progressive destruction and dislocation of the German military, industrial and economic system and the undermining of the morale of the German people to a point where the capacity for armed resistance is fatally weakened."¹⁸⁴

D. *The Laws of Air Warfare and the Allied Bombing of Germany, 1943-1945*

The Allied strategic bombing campaign did indeed attempt to bring about the total collapse of Germany's ability to resist. As the campaign progressed these raids proved increasingly destructive; major German cities were reduced to rubble and ashes one by one. While American planners initially adhered to their belief in precision attacks on vital economic targets, lack of accuracy and the quickly dissipating effects of such raids led to a convergence of American and British efforts devoted to destroying entire urban areas.

According to the post-war United States Strategic Bombing Survey, the Combined Bomber Offensive killed 305,000 German civilians while wounding 780,000 and rendering 1,865,000 homeless.¹⁸⁵ The results, however, never measured up to the projections of interwar air advocates. Not until the last several months of the war did this heavy bombardment yield measurable effects on Germany's capacity for war-making.¹⁸⁶ In addition, the empirical effects of bombing proved exaggerated the interwar predictions of advocates like Douhet: "Under ruthless control [the German people] showed surprising resistance to the terror and hardships of repeated air attack, to the destruction of their homes and belong-

182. For comparisons between American and British planning and their underlying assumptions, see PAPE, *supra* note 136, at 60-66; KONVITZ, *supra* note 163, at 5-24.

183. See generally 3 WEBSTER & FRANKLAND, *supra* note 180, at 284-311 (providing a history of the Allied strategic air campaign).

184. Casablanca Directive, *quoted in* Crowder, *supra* note 178, at 61.

185. United States Strategic Bombing Survey, *quoted in* CLODFELTER, *supra* note 137, at 8.

186. See 3 WEBSTER & FRANKLAND, *supra* note 180, at 302-04;

ings, and to the conditions under which they were reduced to live."¹⁸⁷ These conclusions were reiterated in the official British history of the air campaign: "The cardinal error of intelligence was the description of the German economy as tightly stretched . . . when it was, in reality, resilient, cushioned and increasingly productive, and of the German people as exhausted, disaffected and liable to panic and revolt when, in reality, . . . they were vigorous, calm, stoical and loyal."¹⁸⁸

Though extreme in its destruction, the Allied air campaign has generally been deemed as falling within prevailing laws of war at the outbreak of WWII. A common justification has been that the legal regime governing aerial bombardment was, at best, ambiguous; although the Allies may have pushed the regime to its limits, their actions were not prohibited by any international agreement. Sir Arthur "Bomber" Harris, the commander of British bombing efforts, declared after the war, "International law can always be argued pro and con, but *in this matter of the use of aircraft in war there is, it so happens, no international law at all.*"¹⁸⁹ However, viewing the emerging regime within the context of the changed political and strategic significance of cities reveals the legal regulation of aerial bombardment not as an absence of law but instead as a modern application of the oldest precepts of siege warfare.

Recall that the laws of bombardment inherited from the nineteenth century initially fed attempts to regulate air warfare according to the *status* of targets as defended or undefended. Such attempts proved unworkable in an era when cities might be defended from great distances and might contain, though undefended, vital military assets. Interwar jurists sought instead to limit aerial bombardment according to the *nature* of the target, turning on whether it contained military value.

The clearest doctrinal shift in this direction occurred in the early 1920s, when a major effort to limit air bombardment took place at the Hague. National delegations from the major European powers (excluding Germany) as well as the United States and Japan convened in 1922-23 to negotiate regulations on air warfare.¹⁹⁰

187. See United States Strategic Bombing Survey, *quoted in* CLODFELTER, *supra* note 137, at 9; *see also* STEPHEN T. HOSMER, *PSYCHOLOGICAL EFFECTS OF U.S. AIR OPERATIONS IN FOUR WARS 1941-1991*, at 9-11 (1996) (noting that the psychological effects of air operations against Germany fell short of pre-war expectations).

188. 3 WEBSTER & FRANKLAND, *supra* note 180, at 302.

189. ARTHUR HARRIS, *BOMBER OFFENSIVE 177* (1947) (emphasis added).

190. See Parks, *supra* note 138, at 27-28.

Jurists at the 1923 Draft Conference wrestled with the following paradox: if they immunized cities from aerial bombardment, they would create an incentive for states to move strategically valuable assets (such as military industries) into densely populated areas, thereby inviting the very attacks on cities the legal reformers sought to protect.¹⁹¹ Hence, they sought to proscribe urban targets based on the purpose of bombardment and the nature of the target itself:

Art. 22. Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants is prohibited.

....

Art. 24. (1) Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

(2) Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well-known centers engaged in the manufacture of arms

(3) The bombardment of cities towns, villages, dwellings or buildings not in the immediate neighborhood of the operations of land forces is prohibited. . . .¹⁹²

The Hague Air Rules were never ratified by the Conference parties and therefore never gained binding force.¹⁹³ Their rejection was driven in large part by their inconsistency with strategic efficiency: as outlined earlier, military planners saw bombardment of industrial centers as the quickest means to secure victory.¹⁹⁴

191. See *id.* at 17-18, 28.

192. Hague Rules of Air Warfare, 1923 arts. 22, 24 reprinted in SCHINDLER AND TOMAN, *supra* note 142, at 210.

193. See Parks, *supra* note 138, at 35; see also U.S. DEP'T OF THE AIR FORCE, AIR FORCE PAMPHLET 110-31, *International Law—The Conduct of Armed Conflict and Air Operations*, ch. 5, p. 3 (1976) (stating that the Hague Rules "do not represent existing customary law as a total code") (emphasis in original).

194. See Heinz Marcus Hanki, *The 1923 Hague Rules of Air Warfare: A Contribution to the Development of International Law Protecting Civilians from Air Attack*, 1993 INT'L REV. RED CROSS 12, 19; Parks, *supra* note 138, at 31.

From a legal standpoint, the Hague Rules faced stiff resistance because they represented a radical reversal of the core principles guiding the attack of cities during the previous several centuries. In particular, the Rules sought to shift responsibility for harm suffered by civilians to the *attacker*.¹⁹⁵

Part II explained that the laws of siege warfare were built upon the notion that the *defender* bore the burden of harm to civilians. "[C]ollateral civilian casualties during a siege were regarded as a burden upon the besieged commander—an inducement to end the siege. Bombardment . . . resulting in collateral civilian casualties was not illegal; it was merely a cost of doing the business of war."¹⁹⁶ As the British international legal scholar J.M. Spaight explained in 1911, "It is the impossibility of separating a fortified or defended town from its inhabitants which justifies the bombardment of it; there is a certain solidarity between the garrison and the residents which makes them, as it were, brothers in misfortune when the enemy is at its gates."¹⁹⁷ By the end of WWII, however, Spaight recognized the inapplicability of "defended" as the true test of legitimate attack: "[T]he criterion of defence has in its turn become outmoded. A town's immunity rests to-day on its containing no military objectives . . ."¹⁹⁸ In other words, the defender still bore the burden of incidental harm to civilians, but not due to a city's decision to defend itself but due to the state's grand decisions to resist attack and then to place militarily valuable resources in the vicinity of urban centers.

The shift in emphasis to the character of targets and the incorporation of traditional responsibility for incidental harm lying with the defender pervaded military manuals published during the interwar years. The British Manual of Military Law, for example, stated that:

No legal duty exists for the attacking force to limit bombardment to the fortifications or defended border only. On the contrary, destruction of private and public buildings by bombardment has always been, and still is, con-

195. See Parks, *supra* note 138, at 31-32.

196. *Id.* at 19.

197. SPAIGHT, *supra* note 96, at 158.

198. J.M. SPAIGHT, AIR POWER AND WAR RIGHTS 261 (3d ed., 1947).

sidered lawful, as it is one of the means to impress upon the local authorities the advisability of surrender.¹⁹⁹

M .W. Royse, a prominent interwar authority on the international law of war, similarly concluded:

It cannot reasonably be affirmed to-day that it is wrongful or illegal to bombard a military objective, fairly regarded as such, by all available means of attack; nor does a military objective lose that character merely because it is situated in the midst of a crowded city remote from the immediate zone of land operations. Military objectives are likely to be hunted down and attacked, and the fact that incidental harm may fall upon non-combatants and that the incidental destruction of property may at times approximate devastation probably will be accepted, as heretofore, as an unavoidable incident of warfare.²⁰⁰

In limiting aerial bombardment according to the military character of targets, jurists and drafters of military manuals set up the legal defense of the mass destruction visited upon Germany. On the one hand, regulations based on the character of targets could be, and ultimately were, interpreted broadly. Industrialization and urbanization trends meant that any major city housed crucial military resources or represented a key link in an enemy's war-making capacity. In addition, while the emerging legal regime disavowed the direct terrorization of a civilian population through bombardment, it said nothing about the incidental morale effects of bombing military targets. That is, the regime recognized a distinction between the deliberate targeting of civilians for their own sake versus the strategic use of unavoidable damage to civilians. It is immediately evident that the strategic calculi underlying Allied plans sought to harness this incidental damage to achieve their desired ends. As Prime Minister Winston Churchill remarked to President Roosevelt in 1941, "[W]e must subject Germany and Italy to a ceaseless and ever growing air bombardment. These measures may themselves produce an internal convulsion or collapse."²⁰¹

199. Manual of Military Law 1929, Amend. 12 (Jan. 1936) at 31, *quoted in* Parks, *supra* note 138, at 39.

200. ROYSE, *supra* note 149, at 241.

201. Letter from Churchill to Roosevelt (July 25, 1941), *in* ROOSEVELT AND CHURCHILL: THEIR SECRET WARTIME CORRESPONDENCE 151 (Francis L. Loewenheim et al. eds., Da Capo ed. 1990).

Spaight's apologist, post-war account confirmed that "[i]f in no other way than by target-area bombing can a belligerent destroy his enemy's armament centres . . . , then target-area bombing cannot be considered to offend against the principles of the international law of war."²⁰² For Spaight, the key distinction remained that of intentional versus incidental bombing of civilians. While noting that "[b]ombing for a moral effect only remains unlawful,"²⁰³ he went on to defend Allied bombing as "designed to destroy Germany's material capacity to make war."²⁰⁴ In effect, the fusion of technological, economic, and strategic transformations had conflated notions of direct and indirect, intentional and incidental effects while allowing jurists to retain these distinctions in the abstract.

E. *Strategic Bombing as Siege Warfare*

Failure to limit aerial bombardment through international regulation has been described by some critics as a rejection of any legal structure.²⁰⁵ Indeed, the legal standards governing WWII strategic bombing lacked the clarity of the mechanical rules that had previously regulated the attack and surrender of cities in European warfare. However, by viewing the development of this interwar regime not in isolation—as the law of war's inability to keep pace with technological change—but within the context of changes in the triadic relationship of cities, strategy, and law, a more enlightened picture emerges.

In describing the military experience of WWI, the British military theorist J.F.C. Fuller described the encirclement of Germany and its allies as "the most gigantic siege in history."²⁰⁶ While the allusion to the ancient form of warfare is interesting as an illustration of the protracted struggle along the trench-lined fronts, Fuller's observation bears directly on the way in which changes in military strategy interacted with emerging laws of air warfare during the interwar years.

Recall that the impregnability of sixteenth century fortress towns legitimized the bombardment of civilian property and justified the sacking of towns in the event of an assault; the act of resisting attack, and the resulting perceived necessity of compelling

202. SPAIGHT, *supra* note 198, at 271.

203. *Id.* at 277.

204. *Id.* at 279.

205. See DeSaussure, *supra* note 146, at 306-07.

206. J.F.C. FULLER, WAR AND WESTERN CIVILIZATION 1832-1932, at 231 (1932).

surrender through raising the costs of resistance, shifted responsibility for destruction of cities to the defender. "Bomber" Harris, himself, summoned these customs in defending his conduct after the war:

I never forget, as so many do, that in all normal warfare of the past, and of the not distant past, it was the common practice to besiege cities and, if they refused to surrender when called upon with due formality to do so, every living thing in them was in the end put to the sword. . . . And as to bombardment, what city in what war has ever failed to receive the maximum bombardment from all enemy artillery within range so long as it has continued resistance?²⁰⁷

It was precisely because a besieging army had no direct means of gaining control of a city that the laws of war recognized the necessity of raising the costs of resistance through actions (starvation, bombardment, and occasionally an assault through a breach in defenses) that inevitably brought suffering upon the civilian population. The ultimate object of an early modern siege was not to terrorize noncombatants, though strategists and jurists clearly recognized that civilians would suffer and that such suffering might hasten attainment of legitimate military ends.

Upon consideration of Fuller's observation, it appears that the logic underlying the laws of air warfare in the interwar period mirrored those forming the basis of siege warfare. The costly yet indecisive struggles along WWI fronts (coupled with enormous investments in territorial defenses such as the French Maginot line) along with the perception that threatening the inhabitants of states (cities) could generate pressure for surrender, gave rise to a similar strategic logic:

In World War I . . . decision was sought and attained by gradual attrition of the enemy's entire manpower and materiel reserves, and by choking off his supplies. The war was essentially a gigantic siege operation

Western strategic thinking in World War II was guided by this experience: the strategic task was defined in terms of reducing Germany by siege.²⁰⁸

207. HARRIS, *supra* note 189, at 177.

208. PAUL KECSKEMETI, STRATEGIC SURRENDER 7 (1958).

Sherman's march through the South—seeking to induce national surrender by denying cities the opportunity to avoid destruction—turned the sixteenth century legal regime on its head. The Allied bombing campaign took this inversion one step further, by turning the city-state relationship of early modern Europe inside-out. Rather than a nation-state comprised of quasi-autonomous but individually impregnable fortresses, the modern state possessed a virtually fortified national frontier. It was individual cities within that now lay open and vulnerable to attack from above.

Ironically, by rejecting a nineteenth century regime, based upon the "open city" rule, jurists appeared to be casting aside the very set of rules that derived from siege warfare and attacks on fortified cities. Quite the contrary, in rejecting these rules in favor of standards based on military value, the interwar regime adopted the same principles that had long governed siege-style warfare, though on a magnified, grander scale.

V. CITIES AS ETHNOGRAPHY: THE YUGOSLAV CONFLICT AND THE REVIVAL OF SIEGE WARFARE

A. *The Yugoslav Conflict: A New City, State, and Law Relationship?*

While the laws of siege warfare have received virtually no explicit attention in academic or juristic literature over the past several decades,²⁰⁹ the recent conflict in the former Yugoslavia rekindled images of the "besieged" fortress town. The Serb campaign to carve out an ethnically contiguous state following the 1991 declaration of independence by former Yugoslav republics frequently involved the encirclement and bombardment of Bosnian and Croatian cities. Such attacks became the focus of world-wide media attention. "[T]he international community," declared Secretary of State Warren Christopher in 1993, "will not accept the laying siege of cities and the continued bombardment of civilians, [or] the denial of humanitarian assistance to people in need. . . ."²¹⁰

209. See James Turner Johnson, *War for Cities and Noncombatant Immunity in the Bosnian Conflict*, in RELIGION AND JUSTICE IN THE WAR OVER BOSNIA 63, 79-80 (G. Scott Davis ed., 1996).

210. Statement by Secretary of State Warren Christopher, reprinted in 4 U.S. DEPT OF STATE DISPATCH 584 (1993).

Serb city attacks ultimately led to NATO's extensive air strike operation in the summer of 1995,²¹¹ which played a major role in forging the Dayton Peace Accords.²¹²

While reminiscent of the style and imagery of combat dominant in centuries past, the Yugoslav conflict deviated in important respects from siege warfare of prior eras. Most notably, the ethnic makeup of urban targets, besides their military significance, drove strategy.²¹³

The addition of this ethnic dimension to war has enormous consequences for the interaction of law and strategy. The special characteristics of ethnic warfare, and the ambition of carving out an ethnically homogenous state from a multi-ethnic landscape, placed additional pressures on the legal regime governing attack of cities. The reactions of the international community to Serb city attacks illuminate this tension and provide a lens through which we can view the direction in which the legal regime is moving.

The widespread condemnation of Serb conduct might suggest an emerging consensus in favor of the restrictive provisions regulating the attack of cities found in the Additional Protocols of 1977 to the Geneva Conventions of 1949 (hereinafter Protocol I). A close examination of the international community's response to the conflict—as found in the Western media and activities of the International Tribunal for the former Yugoslavia (hereinafter International Tribunal)—reveals far less consensus regarding the emerging legal regime than one might suppose.²¹⁴ The conduct of the Yugoslav conflict exposes growing strain, not harmony, between law and strategy of modern conflict.

211. See Rick Atkinson & John Pomfret, *NATO Renews Airstrikes on Serb Positions*, WASH. POST, Sept. 6, 1995, at 1; Roger Cohen, *NATO Resumes Bombardment of Serbs*, N.Y. TIMES, Sept. 6, 1995, at 1.

212. See John Pomfret, *Bosnian Serb Losses Could Give Boost to Peace Prospects*, WASH. POST, Sept. 25, 1995, at A13.

213. See International Criminal Tribunal for the Former Yugoslavia, *Tadic Judgement*, at II(A)(3)-(5) (1997) <www.un.org/icty/970507jt.htm#_Toc387417235>; SUSAN L. WOODWARD, *BALKAN TRAGEDY* 233-34 (1995).

214. In focusing on the Serb campaign and alleged Serb violations of international law, I do not mean to suggest that they were exclusively responsible for atrocities. Rather, I focus on their campaign as illustrative of the way in which much of the war was fought and also because the Western media's emphasis on alleged Serb aggression reflects the strongest views on the emerging legal regime's content. Cf. Alexander Cockburn, Editorial, *When Serbs Are Cleansed, It's Silence; Contrary to Media Accounts, the Serbs Are Not the Only Force of Evil in the Bosnian Conflict*, L.A. TIMES, Sept. 28, 1995, at B9 (noting that Western media coverage tended to obscure the brutality of non-Serb parties to the conflict).

B. *City-Based Warfare in the Former Yugoslavia*

In June 1991 Croatia and Slovenia declared independence from Yugoslavia, a federal state formed at the close of WWI comprised of six republics. Several months later the republic of Bosnia and Herzegovina (hereinafter Bosnia) followed suit. Although the Yugoslav Army later agreed to withdraw from these regions, local ethnic Serbs quickly rose up, with the assistance of Serbia, and seized large portions of Croatian and Bosnian territory in an attempt to carve out their own independent states.²¹⁵ So began the dissolution of the Yugoslav state and the four-year offensive by ethnic Serbs to create a Greater Serbia from territories occupied by Bosnian Muslims and ethnic Croats.

Although the military conflict took many forms, Western media focused predominantly on the plight of Croatian and Bosnian cities. Among the earliest attacks on urban targets was the Serb envelopment and bombardment of Dubrovnik, a Croatian city lying on the Dalmatian coast. Several months earlier, the Yugoslav National Army (JNA) and local Serb militia forces had attacked the Croatian city of Vukovar. Three months of siege reduced the baroque town to ashes and rubble.²¹⁶ In October 1991, Serb forces similarly invaded the Dubrovnik area from several sides, imposed a naval blockade of the district, and commenced bombardment of the city.²¹⁷ After surrounding the area, the JNA issued an ultimatum demanding departure of all Croatian military forces and removal of elected public officials. These demands were promptly refused.²¹⁸ For the next thirteen months, this stranglehold and intermittent attacks on the city, with its rings of medieval fortifications, helped galvanize Western opinion against the Serbs.²¹⁹ A *New York Times* editorial lamented in November 1991, "To

215. See generally MISHA GLENNY, *THE FALL OF YUGOSLAVIA* (rev. ed. 1993) (recounting the collapse of the Yugoslav state and the commencement of the conflict).

216. See Chuck Sudetic, *Croats Concede Danube Town's Loss*, N.Y. TIMES, Nov. 18, 1991, at A3.

217. See *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780*, U.N. SCOR, ¶ 26, U.N. Doc. S/1994/674/Annex XLA (1994) [hereinafter *Final Report of the Commission of Experts*].

218. See *id.* ¶ 59.

219. See Chuck Sudetic, *As Siege Ends, Croats Return to Ruined City*, N.Y. TIMES, Nov. 3, 1992, at A6; Adam LeBor & Michael Evans, *Yugoslav Commander Threatens To Halt Croatian Withdrawal*, TIMES (London), Oct. 20, 1992, available in LEXIS, News Library; *Under Siege: Yugoslavia*, ECONOMIST, Nov. 2, 1991, at 45.

Guernica, Coventry, Stalingrad and Dresden the world may now add Vukovar and Dubrovnik."²²⁰

The most well publicized siege of the conflict, however, was that of Sarajevo. From April 1992 until the termination of the conflict, Serb forces surrounded the low-lying capital city and rained shells upon the town below.²²¹ As the U.N. Commission of Experts declared in their 1994 report, "[T]he operations at Sarajevo have developed into a classic siege, with neither side being in possession of either the will or the military ability to force a conclusion."²²²

In addition to the recurrent waves of bombardment, Serb forces blocked the inflow of food, water, energy, and humanitarian relief to the city.²²³ In doing so they began the slow strangulation of the city reminiscent of warfare in early modern Europe, when defensive fortification systems precluded direct assaults. Wrote one city resident in July 1992:

Today . . . is an anniversary: one hundred days of solitude. It has been exactly a hundred days since the first shot was fired on a citizen of Sarajevo, when a sniper killed a young girl who was walking across a bridge. Until that day, the bridge was simply a way of crossing a river we shared. Since then, it has become a border, the sign of intolerable division.²²⁴

Already by November 1993 the *New York Times* reported a toll of 12,000 killed and 56,000 wounded in the siege.²²⁵

While Sarajevo was the most widely publicized, the storming of Srebrenica, in eastern Bosnia, represented one of the bloodiest city attacks of the war. In July 1995 Serb forces overran a Dutch peacekeeping contingent and seized the city and its outlying suburbs.²²⁶ After this successful storm, Serb forces massacred thou-

220. *Listen to the Silence*, N.Y. TIMES, Nov. 22, 1991, at A30.

221. See WOODWARD, *supra* note 213, at 235.

222. *Final Report of the Commission of Experts*, ¶ 32.

223. See John F. Burns, *U.N. Says Bosnia Factions Block Winter Supplies*, N.Y. TIMES, Oct. 14, 1993, at A14; John F. Burns, *In War for Bosnia, the Only Winner Is Despair*, N.Y. TIMES, Nov. 15, 1993, at A1; see also Joel Havemann, *EC Endorses Force If Needed for Sarajevo Aid*, L.A. TIMES, June 28, 1992, at A1 (reporting the European Community's endorsement of humanitarian aid shipments and consideration of military options to ensure relief efforts).

224. ZLATKO DIZDAREVIC, *SARAJEVO: A WAR JOURNAL* 101 (1993).

225. See Burns, *In War for Bosnia, the Only Winner Is Despair*, *supra* note 223, at A1.

226. See DAVID OWEN, *BALKAN ODYSSEY* 326-27 (1995).

sands of Muslims and brutally laid waste to the town.²²⁷ Upwards of 40,000 Muslim civilians streamed from the city and its surrounding area to avoid further terrorization.²²⁸ Serb forces followed up this invasion with a similar assault against the nearby enclave of Zepa. Again, great waves of Muslim civilians fled the city and its suburbs.²²⁹

The Serbs' emphasis on encirclement or conquest of Bosnian and Croatian cities flowed from the geographic features of Bosnian and Croatian territory, as well as military and political characteristics of the conflict. Because of its undulating, mountainous terrain, control of major cities was necessary to secure routes between the various regions.²³⁰ Furthermore, the location of cities along major transportation links between Bosnia and Serbia made their capture vital to linking Serbs' territorial gains to their parent state.²³¹ Only control of cities secured control of these key connecting roads.²³²

From a military operational standpoint, siege represented the most viable form of warfare because the Serbs possessed abundant artillery while lacking sufficient manpower to overrun cities by direct means.²³³ The raising of Muslim militia forces in Bosnia and the deployment of defensive barricades throughout major cities such as Sarajevo made a quick assault on cities too costly to contemplate seriously.²³⁴ One of the earliest military lessons of the conflict, after the first Serb city attacks, appeared to be the terribly

227. See *id.* at 327; Stephen Kinzer, *Hague Tribunal Weighs International Arrest Warrants for Two Top Bosnian Serbs*, N.Y. TIMES, July 9, 1996, at A10.

228. See Chris Hedges, *Bosnian Serbs Open Drive on a Second U.N. 'Safe Area'*, N.Y. TIMES, July 14, 1995, at A8; Chris Hedges, *Second 'Safe Area' in Eastern Bosnia Overrun by Serbs*, N.Y. TIMES, July 20, 1995, at A1; Stephen Kinzer, *Terrorized Human Tide Overwhelms Relief Camp*, N.Y. TIMES, July 15, 1995, at A4; Stacy Sullivan, *Serbs Allow Bosnia Refugees Few Places to Run for Safety*, CHRISTIAN SCI. MONITOR, July 20, 1995, at 6; *UN Soldiers Pushed Aside in Fighting for 'Safe Area'*, CHI. TRIB., July 16, 1995, at A3.

229. See Chris Hedges, *Second 'Safe Area' in Eastern Bosnia Overrun by Serbs*, *supra* note 228, at A1.

230. See Johnson, *supra* note 209, at 81.

231. See 1 *Annexes to the Final Report of the Commission of Experts*, U.N. SCOR, ¶¶ 12-14, U.N. Doc. S/1994/674/Add.2 (1995) [hereinafter *Annexes*].

232. This logic was probably based on the assumption that the conflict would likely remain a conventional, as opposed to guerrilla, war. During WWII, Yugoslav partisan guerrillas took advantage of the Balkan terrain to pose a constant threat to German occupied forces, despite German control of major cities. See PAUL N. HEHN, *THE GERMAN STRUGGLE AGAINST YUGOSLAV GUERRILLAS IN WORLD WAR II* 67-69, 93-96 (1979).

233. See WOODWARD, *supra* note 213, at 235.

234. See Burns, *In War for Bosnia, the Only Winner Is Despair*, *supra* note 223, at A1.

high price of capturing urban areas with infantry forces.²³⁵ "So instead, the Serbs rediscovered the medieval siege, putting citizens under barrage and psychological pressure but not launching a frontal attack."²³⁶ Occasionally, as in Srebrenica, rapid assault was possible. In most cases, however, the Serbs' wealth of firepower but paucity of infantry troops limited their options to protracted siege operations. In Sarajevo these constraints, combined with Muslim forces' inability to defend against bombardment from the hills, made siege the natural device.²³⁷ The great advantages held by urban defenses over assaulting forces ensured that city-by-city warfare, rather than fluid battle lines, would dominate the conflict.

But aside from these geographic and military factors, the political objectives driving the Serb offensive produced the greatest motivation for besieging cities. In particular, the twin goals of expelling opposing ethnic groups and shattering symbols and manifestations of multi-ethnicity made cities enticing targets.

To the Serbs, cities posed obstacles in their path toward ethnic and nationalist homogeneity. Creation of a viable Serb state within Bosnian and Croatian territory therefore required expelling rival ethnic groups.²³⁸ Serb strategy aimed not at destroying the enemy militarily but ultimately on securing its claim to territory, "an aim that includes having a population in place that supports the political aims of the side in question."²³⁹

Dubbed "ethnic cleansing,"²⁴⁰ these ambitions could be most efficiently furthered by brutal attacks on cities, home to large proportions of the population and concentrations of civilians prone to terrorization. "The overriding political goal of depopulating these areas of non-Serbs determined the nature of the military activities. These areas were . . . civilian areas with strategic importance derived from the fact that they linked Serbia with Serbs in [Bosnia] and Croatia Confrontation lines [were] therefore in and around cities and villages . . ." ²⁴¹ Highly publicized terrorization of cities would cause urban populations, along with residents of

235. See OWEN, *supra* note 226, at 84. For a first-hand military analysis of the problems faced by Serb military forces in assaulting cities, see also Lt. Col. Milos Postic, *Combat Actions for Centers of Population: East Slavonian Battlefield 1991/92*, reprinted and translated in FBIS-EEU, Aug. 1, 1996.

236. OWEN, *supra* note 226, at 84.

237. See Annexes, ¶ 190.

238. See *id.* ¶ 13.

239. Johnson, *supra* note at 81.

240. See *Final Report of the Commission of Experts*, ¶¶ 130-34.

241. 1 Annexes to the *Final Report of the Commission of Experts*, ¶¶ 13-14.

surrounding countryside, to flee. The sack of Srebrenica, and its massive refugee flood, is a case in point.²⁴²

Aside from the removal of ethnic *populations*, the Serb city campaign aimed to eradicate vestiges of a multi-ethnic *state*. The Serb drive for independence from Bosnian and Croatian statehood required shattering the cohesive bonds of Yugoslav national unity that had been forged since WWII. Unlike the rural countryside, cities of the former Yugoslavia had tended towards accommodation of the many cultures and nationalities comprising their populations.²⁴³ Because of their mixed demographic composition, cities stood as symbols of this multiethnic coexistence,²⁴⁴ and contrary to the Serb leadership's appeal to a traditional agrarian ethos.²⁴⁵ The siege of Sarajevo, for instance, aimed directly at destroying a symbol of multiethnicity: "Far more than a military target, Sarajevo stood as a mockery to national exclusiveness."²⁴⁶ These objectives were not lost on city residents. As a citizen of Dubrovnik grieved, "By killing people, not even sparing children, destroying homes, factories, roads and bridges, closing the national airspace and blockading sea ports . . . Serbia is trying to defeat us retroactively in our past: it is intent on erasing our historical memory and eliminating us from the consciousness of other nations."²⁴⁷

The Serbs' strategic objectives—in particular their desire to carve out a viable, ethnically homogenous, and contiguous Serb state—posed enormous difficulties for the application of the laws of war. Creating a secure state required gaining control of certain defensible strips of territory, particularly along major transportation routes.²⁴⁸ Assertion and protection of these claims, above all else, drove the parties' conduct during the conflict. As Susan Woodward observed:

242. See Chris Hedges, *Serb Forces Shell U.N. Peacekeepers at Second 'Safe' Area*, N.Y. TIMES, July 15, 1995, at A1; Stephen Kinzer, *Muslims Tell of Atrocities in Bosnian Town*, N.Y. TIMES, July 14, 1995, at A1; John Pomfret, *Serb Forces Renew 'Ethnic Cleansing'*, WASH. POST, Oct. 10, 1995, at A21.

243. See WOODWARD, *supra* note 213, at 235-38.

244. See *id.* at 234.

245. See Nicholas M. Horrock, *Burden of History: In Serbs' Eyes, Past Justifies Present*, CHI. TRIB., May 23, 1993, at C1.

246. WOODWARD, *supra* note 213, at 235.

247. Igor Zidic, *The Siege of Dubrovnik and the City's Wounds*, in DUBROVNIK IN WAR 59, 61 (Matica Hrvatska ed., 1993).

248. See George Kenney, *Ending Bosnia's Endgame*, N.Y. TIMES, Dec. 1, 1994, at A33; Ronald Steel, *A Realistic Entity: Greater Sarajevo*, N.Y. TIMES, July 26, 1995, at A19.

Military strategy in this case was not driven by ethnic hatred, class conflict, or historical aspirations for territory, but by the geopolitical and institutional preconditions of sovereignty: obtaining the strategic and economic assets and borders of a secure future state Strategically defensible territories may have little relation to the borders defined . . . by the patterns of migration and settlement of individuals and households . . . ; but short of such security, a state is incomplete.²⁴⁹

Seen in this light, ethnic cleansing, or at least the forced movement of populations, was not merely a side effect but the very essence of the conflict.

C. *Protocol I and the Laws of City-Targeting*

While all sides to the conflict recognized that perceived legitimacy or illegitimacy of city attacks had political and strategic significance, the body of norms upon which that legitimacy hinges has not been clearly articulated in recent years. The Second World War and the legal regime emanating from it entrenched the proposition that the character of cities as "military objectives" legitimized their attack.

Protocol I sought repudiation of this liberal proposition by refining the concept of military objective in terms of cities' relation to military strategy:

Insofar as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in circumstances ruling at the time, offers a definite military advantage.²⁵⁰

According to one of the leading commentaries on the Protocols:

This does not require a direct connection with combat operation Thus a civilian object may become a military objective and thereby lose its immunity from delib-

249. WOODWARD, *supra* note 213, at 272.

250. Protocol I Additional to the Geneva Conventions, Aug. 6, 1977, art. 52(2), 1080 U.N.T.S. 371, 16 I.L.M. 1391, *reprinted in* SCHINDLER & TOMAN, *supra* note 142, at 652.

erate attack through use which is only indirectly related to combat action, but which nevertheless provides an effective contribution to the military phase of a Party's overall war effort.²⁵¹

But what constitutes "effective contribution"? The International Committee of the Red Cross (ICRC) commentary on the Protocols asserts that this broad principle of "military objective" has long been incorporated into legal conventions, but that its precise meaning has proven elastic.²⁵² The previous case shows this all too well: Allied bombings in WWII effectively melded notions of military and non-military targets to the point where a target's mere contribution to a defender's willingness to surrender defined its "military" character. Similar logic pervaded American planning in the Vietnam War, where aerial bombardments, most notably the "Christmas Bombing" campaign of 1972-73, were intended to make life "so miserable and wretched for the remaining large population of Hanoi [that] public pressure would be brought on the North Vietnamese authorities to resume serious truce negotiations."²⁵³ Despite technological progression and resulting increases in the precision of bombardment from the skies, target sets have invariably expanded to include not only enemy military assets but targets of political value as well when direct means of destroying an enemy's capacity to wage war have proved evasive.

For similar reasons, the WWII-era legal regime recognized siege as a legitimate instrument in warfare. The collocation of combatants and non-combatants, as well as the comparative advantages of urban defenses, had long justified resort to methods likely to injure the civilian population. In Spaight's words, "The solidarity between the troops and the inhabitants of a fortified town . . . may almost be said to deprive the latter, temporarily, of their non-combatant character."²⁵⁴ That for centuries urban defenses made a direct, army-on-army assault militarily unviable meant that attacking forces had to resort to indirect means to achieve capitulation of a city. Consequently, the use of protracted siege opera-

251. MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 324 (1982).

252. COMMENTARY ON THE ADDITIONAL PROTOCOLS 630-35 (Yves Sandoz et al. eds., 1987).

253. Hamilton DeSaussure and Robert Glasser, in LAW AND RESPONSIBILITY IN WARFARE: THE VIETNAM EXPERIENCE 119, 129 (Peter D. Trooboff ed., 1975).

254. SPAIGHT, *supra* note 96, at 164.

tions to starve city occupants, combatants and non-combatants alike, into submission gained widespread acceptance as a method of warfare.²⁵⁵

Following WWII, the Nuremberg Trials affirmed the legitimacy of starvation as a means of subjugating cities. In the *High Command Case*, the court deemed lawful Field Marshal von Leeb's order to fire on Russian civilians attempting to escape through German lines during the siege of Leningrad:

A belligerent commander may lawfully lay siege to a place controlled by the enemy and endeavor by a process of isolation to cause its surrender. The propriety of attempting to reduce it by starvation is not questioned. Hence, the cutting off of every source of sustenance from without is deemed legitimate. . . .

We might wish the law were otherwise but we must administer it as we find it.²⁵⁶

Similar principles were adopted by the 1956 edition of the United States Army Field Manual, *The Law of Land Warfare*: "[I]f a commander of a besieged place expels the noncombatants in order to lessen the logistical burden he has to bear, it is lawful, though an extreme measure, to drive them back, so as to hasten the surrender."²⁵⁷

The significance of these statements lies not simply in their condoning the use of starvation, however. They also make explicit the motive—compelling surrender—that justifies its use.²⁵⁸ Starvation has traditionally been accepted both at the city level and at the national level, as in the case of blockades,²⁵⁹ as a legitimate means of

255. See Charles A. Allen, *Civilian Starvation and Relief During Armed Conflict: The Modern Humanitarian Law*, 19 GA. J. INT'L & COMP. L. 1, 82 (1989); Yoram Dinstein, *Siege Warfare and the Starvation of Civilians*, in HUMANITARIAN LAW OF ARMED CONFLICT 145, 150-52 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991).

256. *High Command Case* (U.S.A. v. von Leeb et al., 1948), 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 563 (1950) (quoting 3 HYDE, INTERNATIONAL LAW 1802-03 (2d rev. ed. 1945)).

257. U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 20 (1956).

258. See George Alfred Mudge, *Starvation as a Means of Warfare*, 4 INT'L LAW. 228, 246 (1970).

259. See *id.* at 247-51; see also L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 170 (1993) (noting that "[I]nternational law allows a belligerent to take measures to cut the adverse party off from intercourse with the rest of the world," but inter-

influencing the decision making of those empowered to capitulate. As Lauterpacht explained, "The practice of two world wars was based on the view that no . . . sacrosanctity attaches to the civilian population at large as to make illegal the effort to starve it alongside the military forces of the enemy as a means of inducing him to surrender."²⁶⁰ As will be seen below, the purpose of compelling a surrender lies at the heart of both customary and contemporary views on the legality of siege.

Since WWII, growing respect for humanitarian concerns and minimizing civilian suffering has called into question the legitimacy of specific practices such as von Leeb's brutal siege orders at Leningrad.²⁶¹ A swelling international human rights movement has at the very least increased global awareness of, and stiffened public resistance to, the use of starvation as a method of warfare.²⁶² To some scholars and commentators, then, the set of norms governing attacks on cities has evolved substantially since the immediate post-WWII period.²⁶³ To them, Protocol I codified these changes.

Article 54 of Protocol I prohibits starvation as a method of warfare:

1. Starvation of civilians as a method of warfare is prohibited.
2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs. . . , for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive

preting Protocol I's Article 54 as making illegal those blockades intended to starve the enemy population).

260. H. Lauterpacht, *The Problem of the Revision of the Law of War*, 1952 BRIT. Y.B. INT'L L. 360, 374.

261. See *id.* See also GEOFFREY BEST, *WAR AND LAW SINCE 1945*, at 255 (1994) (Protocol I "carries to its logical conclusion the concern to protect civilians in wartime which has headed the [International Humanitarian Law] agenda since the Second World War.").

262. See Allen, *supra* note 255, at 48-59 (1989).

263. See, e.g., Waldemar A. Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AM. U. J. INT'L L. & POL'Y 117 (1986).

3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:

(a) As sustenance solely for the members of its armed forces²⁶⁴

In prohibiting starvation as a means of warfare, the Protocols deviated from long-standing customary practice.²⁶⁵ Indeed, some scholars have posited that Protocol I makes all siege warfare illegal.²⁶⁶ To proponents of the Article 54 prohibitions, these provisions reflect a worldwide demand to shatter customary acceptance in favor of more restrictive norms. As one supporter explained, "[T]he earlier response of revulsion to such [starvation] practices has changed to a consensus that they cannot be tolerated in the modern humanitarian legal order. The starvation article is an apt reflection of that consensus."²⁶⁷

But while there may be a growing international consensus regarding the protection of human rights and reducing unnecessary suffering, the degree to which that consensus has translated into positive constraints on the use of starvation as an instrument of strategy is far from clear. Recent, arguably analogous attempts by the United States and its allies to impose embargoes against Iraq and Haiti, even in the face of civilian privations,²⁶⁸ demonstrate instead a *lack* of consensus regarding the practical result of modernizing humanitarian order. The precise lines of legality governing efforts to starve an enemy, prior to and after Protocol I, remain elusive.

264. Protocol I, *supra* note 250, at art. 54.

265. See BOTHE ET AL., *supra* note 251, at 336 ("By prohibiting starvation of civilians as a method of warfare, Art. 54 establishes a substantial new principle of international law . . ."); Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 153 (1985) ("Article 54, by prohibiting starvation of civilians as a method of warfare, establishes a significant new principle of international law."). But see Allen, *supra* note 255, at 68 ("The Protocol I treatment of starvation in warfare reflects the complexities of the issues and the deference that must be accorded to the harsh realities of warfare. . . . Article 54 contains both general humanitarian principles and criteria to guide decision-making during conflict.").

266. See Dinstein, *supra* note 255, at 150-52; Roberts, *supra* note 265, at 152-54.

267. Allen, *supra* note 255, at 82.

268. See Lori Fisler Damrosch, *The Civilian Impact of Economic Sanctions*, in ENFORCING RESTRAINT, 274, 295-96 (Lori Fisler Damrosch ed., 1993); see also Michael R. Sklaire, Note, *The Security Council Blockade of Iraq: Conflicting Obligations Under the United Nations Charter and the Fourth Geneva Convention*, 6 AM. U. J. INT'L L. & POL'Y 609, 624, 635 (1991) (arguing that U.N. sanctions against Iraq violated humanitarian obligations under the Geneva Conventions).

Similar ambiguities exist with respect to the bombardment of cities. Protocol I demands that attacking forces minimize the risk to civilians, even those collocated with military assets. As noted earlier, Article 52 confines attacks to "military objectives" only. Article 51 also prohibits attacks that are "of a nature to strike military objectives and civilians or civilian objects without distinction,"²⁶⁹ as well as attacks "by bombardment . . . which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, [or] village."²⁷⁰ Taken together, these provisions suggest that bombardment should no longer be directed at cities as a whole, but must be directed as far as possible at particular military assets within the city.

To proponents of Protocol I, these restrictions reflect a convergence of law and strategy: In describing Article 51's prohibition of indiscriminate attacks, for instance, the ICRC's commentary asserts that "most armies endeavor to use accurate weapons as attacks which do not strike the intended objective result in a loss of time and equipment without giving a corresponding advantage. . . . *Here, military interests and humanitarian requirements coincide.*"²⁷¹ The conduct of Allied Coalition forces during the 1991 Persian Gulf War, in which allied aircraft utilized precision-guided munitions when attacking urban targets, might seem to vindicate the claims of those who argue that Protocol I reflects not only emerging legal custom but also notions of military effectiveness. It may even further be read to reflect an apparent rejection of morale bombing—the use of bombardment to erode civilian will to resist—as an effective military tool. But these claims make assumptions about the "military objective" that may prove tenuous in other contexts. As the U.S. Defense Department's post-Gulf War report noted, "'Military advantage' is not restricted to tactical gains, but is linked to the full context of a war strategy. . . ."²⁷² When the strategic objective sought is rapid destruction of an enemy's military force, then the provisions of Protocol I will generally accord with operational efficiency. But many modern conflicts may demand less direct means to achieve political objectives. In 1952, the United States adopted a new aerial bombardment

269. Protocol I, *supra* note 250, at art. 51(4).

270. Protocol I, *supra* note 250, at art. 51(5)(a).

271. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 252, at 621 (emphasis added); see also Hans Blix, *Means and Methods of Combat*, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 135, 145 (UNESCO, 1988).

272. CONDUCT OF THE PERSIAN GULF WAR, *supra* note 4, at 613.

strategy for the Korean War in the face of a stalemate on the ground and stalled peace talks: "Whenever possible, attacks will be scheduled against targets of military significance so situated that their destruction will have a deleterious effect upon the morale of the civilian population actively engaged in the logistic support of enemy forces."²⁷³ In Vietnam, the United States also targeted cities to compel a favorable negotiated settlement when direct military solutions seemed untenable. The Serb campaign against cities similarly reflected a choice of methods deemed consistent with its broader objectives. But can the emerging legal regime intelligibly regulate these methods?

D. *The Serb Campaign and the Divergence of Law of Strategy*

In many ways, the Serb campaign provides a potentially fruitful test case for examining the content of the legal regime governing the attack of cities. Both the International Tribunal²⁷⁴ and Western press coverage²⁷⁵ focused predominantly on the plight of cities. The Statute of the International Tribunal authorized the prosecution of persons violating the laws and customs of war, including "wanton destruction of cities, towns or villages, or devastation not justified by military necessity," and "attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings."²⁷⁶ International efforts to contain the conflict magnified the role of city attacks and mobilized world public support for Western intervention. Under U.N. Resolution 824, the Security Council declared in May 1993 that Sarajevo, Srebrenica, and four other threatened urban areas would be treated as "safe areas," free from armed attack.²⁷⁷ Thereafter, debates about NATO air strikes or Western military action focused on alleged Serb violations of these provisions, further concentrating international attention on the plight of cities under assault.²⁷⁸ Because the war's drama unfolded across a world-wide stage, the perceived legality of parties' actions always had potential political consequences, es-

273. Brig. Gen. Jacob Smart, quoted in CLODFELTER, *supra* note 137, at 17.

274. See *Nab These Criminals*, TORONTO STAR, July 13, 1996, at C2.

275. See Georgie Anne Geyer, *For the Media, Bosnia Complexity is a Big Photo-Op*, CHI. TRIB., Dec. 22, 1995, at 25 (arguing that the press focused on the siege of Sarajevo but largely ignored overall geopolitical issues of the conflict).

276. Statute of the International Tribunal art. 3(b), (c).

277. See DICK A. LEURDIJK, *THE UNITED NATIONS AND NATO IN THE FORMER YUGOSLAVIA* 42-43 (1994); WOODWARD, *supra* note 213, at 307-09.

278. See LEURDIJK, *supra* note 277, at 41-66; Statement by Secretary of State Warren Christopher, reprinted in 4 U.S. DEP'T OF STATE DISPATCH 584 (1993).

pecially with respect to Western intervention. A single, well-publicized incident, like the February 1994 Sarajevo market place shelling, could generate intense pressure for NATO air strikes.²⁷⁹ The focused attention of international efforts and public opinion provides a rich series of expressions from which to construct the legal regime regulating the attack of cities.

This last point, however, cuts both ways. While the extensive publicity and attention devoted to city attacks provide abundant data to sift through, many of the accounts are politically charged—the political sensitivity and the temporal proximity of the conflict may exert biases that must be borne in mind in any analysis of the conflict. That caveat noted, even the politically charged reaction of the international community yields inferences regarding how cities can expect to be treated in modern conflict.

The publicity and widespread Western condemnation of Serb sieges and attacks on cities would seem at first glance to bolster the claims of those arguing that the laws of war have evolved significantly since the post-WWII period. However, close scrutiny of the International Tribunal's activities and the arguments aired in the Western press reveal instead only marginal and reluctant deviation from the principles inherited from WWII and earlier. This analysis also reveals that assumptions inherent in Protocol I's provisions match poorly with the reality of modern conflict.

Some critics of the Tribunal's activities have asserted that, notwithstanding developments such as Protocol I, siege remains a legitimate method of warfare. They invoke customary practice as evidence, implying that intervening events and international developments have not overridden centuries-long validation of siege's legality. The most focused debate on siege itself stemmed from the Tribunal's indictment of a Serb general, Djordje Djukic, for his participation as logistics commander supporting the siege of Sarajevo. Although a trial failed to take place due to Djukic's death,²⁸⁰ the debate surrounding the indictment is instructive in itself.

To opponents of the Djukic indictment, siege in the former Yugoslavia was like siege of centuries past—a legitimate and oft-employed instrument to bring about the surrender of heavily fortified cities:

279. See LEURDIJK, *supra* note 277, at 51-58; OWEN, *supra* note 226, at 255-57.

280. See *War Crimes Suspect Succumbs to Cancer*, N.Y. TIMES, May 20, 1996, at A8.

The real problem with the accusations is their horrible banality. . . . Despite the tribunal's allegation that shelling Sarajevo had "no military significance," attacks on civilian areas have been ordered in any number of conflicts, precisely because demoralizing the population can be militarily very significant.

Did Harry Truman order the A-bombing of Hiroshima and Nagasaki "in order to kill, injure, terrorize and demoralize the civilian population" of Japan? Of course he did, and, for the most part, history has treated him kindly for it. Winston Churchill ordered the firebombing of Dresden for the same awful reason. . . .

. . . Djukic is accused of participating in a military siege not unlike those that have been part of warfare from time immemorial.²⁸¹

The same reasoning echoed in other criticisms of the Djukic indictment: "The [Djukic] indictment seems troublesome. . . . Military attacks on civilian targets have become commonplace in the twentieth century precisely because of the potential for puncturing the enemy's political will to fight. Exemplary were the World War II firebombings of Dresden and Tokyo"²⁸²

Perhaps surprisingly, those demanding Djukic's prosecution rarely questioned directly the legality of siege. Instead, they sought to draw distinctions between legitimate and illegitimate sieges based on the overall objectives underlying strategy. As an editor for the Bosnian daily *Oslobodjenje* replied to the above-cited editorial statements:

There is a huge difference, however, between the bombings ordered by Truman or Churchill and those carried out by Djukic's "Army of Republika Srpska." While the American and British wartime leaders represented an international alliance fighting fascist regimes that were engaged in aggression and genocide, the Bosnian Serb army

281. Edward Cody, *Is It a War Crime, or Just War?*, WASH. POST, April 7, 1996, at C5.

282. Bruce Fein, *War Crimes Indictment at War with Itself?*, WASH. TIMES, April 16, 1996, at A17.

waged a war *that was itself characterized by aggression and genocide*.²⁸³

The narrow focus of other Tribunal indictments corroborates the position that illegality in the Serb campaign was more likely to lie in the underlying purpose and particular acts of barbarism that occurred as part of the siege, than in the decision to employ siege methods in attacking cities. As Richard Goldstone, the former chief prosecutor for the Tribunal, himself explained:

We have started indicting the most guilty, the Bosnian Serb leadership, including Radovan Karadzic and Gen. Ratko Mladic. They have been charged with 36 counts, including genocide, crimes against humanity, and war crimes which cover instances of unlawful confinement, murder, rape, sexual assault, torture, beating, robbery, the sniping and mortaring of innocent civilians during the horrible years of the siege of Sarajevo, and the destruction of homes, businesses, and places of worship and the mass killings at Srebrenica.²⁸⁴

Note the emphasis on conduct during siege, but not ordering sieges themselves.

One commentary on Goldstone's explanation brings to the surface the ambiguity surrounding the legality of siege and the difficulty inherent in viewing conduct during a siege separately from the act of siege itself:

Indeed, [Goldstone's indictments] leave out some of the acts perpetrated by Gen. Mladic's forces that those of us who experienced the war in Bosnia felt and continue to feel were criminal, notably the siege of Sarajevo itself. But while sieges are not necessarily violations of the laws of war, systematic sniping campaigns are.²⁸⁵

283. Kemal Kurspahic, *Sarajevo's Siege: Crime Not War*, WASH. POST, April 17, 1996, at A23 (emphasis added).

284. Richard Goldstone, Editorial, *War Crimes Atrocity Victims in Bosnia Cry Out for Justice*, SAN DIEGO UNION-TRIB., Dec. 17, 1995, at G1. See also Terry Atlas, *Atrocity Docket: UN Has Done Little to Prosecute Villains in Bosnia*, CHI. TRIB., Feb. 13, 1994, at 1 (urging that top Serb leadership should be prosecuted for the siege of Sarajevo because they failed to prevent the deliberate shelling of civilians, not for the siege itself).

285. David Rieff, *Arrest Them; The Case Against the Serb War Criminals*, WASH. POST, Sept. 8, 1996, at C1.

Again, the specific way in which the siege was conducted—and the strategic objectives that motivated it—emerge as the focus of condemnation. Even the critics of Serb siege tactics implicitly seem to acknowledge that siege remains a useful and justifiable method of war, but that its legality erodes when the civilian population itself is the primary strategic object of the attacker.

The drafters of Protocol I anticipated these corrupt purposes and tried to build the injunction against them expressly into the legal regime. Protocol I specifically prohibits starvation with the *motive* of forcing the civilian population to move away.²⁸⁶ This addition is buttressed by Article 51, which prohibits the direct and deliberate terrorization of civilians: “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”²⁸⁷

Unlike the prohibition of starvation as a means, the principles behind Article 51 have long appeared in international conventions and now enjoy almost universal (if only superficial) acceptance as custom.²⁸⁸ In adopting language that prohibits attacks whose “primary purpose” is to spread terror, the Protocols respect the long-standing distinction present in justifications for starvation: The legitimacy of those acts of siege whose primary purpose is to compel military surrender is elevated above that of those aimed at the civilian population for its own sake. As a corollary, attacks that *incidentally* terrorize the civilian population retain legitimacy, so long as the attack itself is otherwise legal.²⁸⁹ That is, the legitimacy of attacks on urban targets turn largely on the intent of the attacker; so long as terrorization is not the *primary* goal, even though it may be a foreseeable (and perhaps desired) one, Article 51 prohibitions lie dormant.²⁹⁰

286. See Protocol I, *supra* note 250, at art. 54(2) (“It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population . . . for the specific purpose of denying them for their sustenance value . . . whether in order to starve out civilians, to cause them to move away, or for any other motive.”).

287. Protocol I, *supra* note 250, at art. 51(2). See also BOTHE ET AL., *supra* note 251, at 300-01 (providing commentary on this provision).

288. See Solf, *supra* note 263, at 130 (“In general, article 51 reaffirms existing customary law prohibiting attacks against civilians as such.”).

289. See Blix, *supra* note 271, at 142-43; BOTHE ET AL., *supra* note 251, at 300-01. Under the principles of customary international law, for instance, parties must still comply with the principle of “proportionality,” which demands abstaining from military attacks against targets when injury to civilians and civilian property would likely be out of proportion to the reasonably expect military advantage. See *id.* at 276.

290. See Blix, *supra* note 271, at 143.

But as noted above, the lines separating levels of intent blur in practice. Against a well-entrenched enemy, whether at the city or national level, attackers often attempt to erode enemy public support for continued resistance. Serb attacks on cities, including shelling and sniping, bring to the surface this tension between the Protocol's suppositions and perceived strategic reality in the eyes of warring parties. Abundant evidence reveals that Serb city attacks aimed to drive out non-Serb populations and formed a key element of Serb "ethnic cleansing." Whereas traditional siege warfare harnessed the incidental impact on non-combatants as a means towards achieving their military objective, surrender of the city, Serb siege warfare appeared directed not at "the defending forces but the inhabitants of the populated areas themselves" ²⁹¹ If expelling portions of a city's population is the aim, rather than compelling surrender of defending military forces or disrupting war industries, then it becomes difficult to view siege as *incidentally* terrorizing civilians. ²⁹²

The U.N. Commission of Experts attempted to draw this distinction with respect to Serb bombardment of cities and towns:

There are cases in which [Bosnian Serb Army] artillery has been directed against military objectives and, nevertheless civilian casualties have been caused. In these cases, it is appropriate to attempt to measure military advantage gained against suffering caused to the civilian population in a crude proportionality equation. Quite frequently, however, application of the rule of proportionality will be irrelevant for the simple reason that causing civilian casualties is the objective of [Bosnian Serb Army] action, *not an incidental effect*. ²⁹³

Applying the Protocols to the Yugoslav conflict is troublesome because the regime they construct does not contemplate the object of Serb efforts—to expel portions of a population through terrorization—as the very essence of a party's strategic vision.

Once again, the issue of compliance with Protocol I's provisions is complicated by the particular strategic objectives involved. The Protocols make implicit assumptions about the way modern wars are fought, and for what ends. As noted earlier, Protocol I's pro-

291. Johnson, *supra* note 209, at 63.

292. See *id.* at 83.

293. *Final Report of the Commission of Experts*, ¶ 83, U.N. Doc. S/1994/674/Annex VI.B (emphasis added).

ponents describe its restrictions as militarily efficient, because concentrated attacks on military assets are the quickest path to victory. But this logic seems at odds with the reality of the Yugoslav conflict. "The political goal of creating national states made little distinction between military and civilians, either as fighters or as targets."²⁹⁴ The need to carve out defensible, sovereign states inevitably pit the goals of the opposing armies against the normative code espoused by proponents of Protocol I.

This is certainly *not* to condone the conduct or objectives of the Serb campaign. It is, however, to acknowledge disharmony between the law and strategy in modern conflict. Serb forces terrorized cities not simply to force their individual surrender, nor even to exploit urban populations' fear to induce capitulation at the national level. The customary legal regime, with its traditionally permissive standards for besieging cities, was constructed with these purposes in mind. Rather than utilizing the political relationship between cities, their populations, and states to achieve their overall objectives, Serb planners sought to sever these relationships. In adopting the "siege" as a primary tool, the Serb campaign hearkened back to the military campaigns across early modern Europe. Yet it simultaneously deviated from their purposes, and hence the norms that emerged from that era and remain the focus of modern law.

The Yugoslav conflict exposes further tensions between Protocol I and modern strategy. Articles 51 through 54 attempt the same transfer of responsibility that the Hague Air Rules' drafters fought unsuccessfully to achieve in 1923: They further shift the burden onto the attacker for incidental suffering caused by attempts to subdue a sometimes legitimate military objective.²⁹⁵ As with the Air Rules, this shift in burden represents a far greater transformation in the legal regime than the prohibition against a single method of warfare would suggest. And, like the Air Rules, this drift may lie too far at odds with accepted practice to gain acceptance as customary law:

The Protocol completely fails to take into account the inherent nature of siege warfare in which starvation of those within the invested location is not an end but a means. *It is important to bear in mind that a siege does not*

294. WOODWARD, *supra* note 213, at 244.

295. See Allen, *supra* note 255, at 62; DeSaussure, *supra* note 146, at 49-50; Dinstein, *supra* note 255, at 150-51; Parks, *supra* note 138, at 112.

*generate starvation for the purpose of killing civilians with hunger, but only in order to cause the encircled town to surrender.*²⁹⁶

Even if one rejects customary practice as a basis for legitimizing siege, the shift in responsibility from attacker to defender can lead to paradoxical results. During the interwar years, drafters of aerial bombardment limitations contended with the predicament that requiring an attacker to avoid certain targets that contain strategic value might lead the defender to intentionally place civilians at risk, so as to immunize those targets. In certain contexts, Protocol I may similarly give the defender the incentive to expose its own urban residents to the very harm humanitarian law seeks to alleviate.

That much of the fighting and defense of Bosnian and Croat cities involved local militia units,²⁹⁷ as opposed to fully organized, national armies, exacerbated the perverse incentive structure of urban conflict that the laws of war must confront: not only are civilian non-combatants and military forces and assets all situated in urban settings, but there may even be operational incentives for the defender to employ tactics likely to put those civilians at greater risk. In Sarajevo, for example, the Bosnian Army intentionally dispersed its forces throughout the city to avoid providing a concentrated target for Serb artillery.²⁹⁸ As a U.S. Army lawyer described the Sarajevo situation: "To take the city, the Serbs would likely have to resort to a house-to-house struggle against a numerically superior force in an urban area, a fight that certainly would result in a large number of casualties. Rather than attempt such a fight, the Serbs have resorted to siege warfare."²⁹⁹ In its similar assessment of the situation, the U.N. Commission of Experts concluded that "[c]ompliance with the law of armed conflict is particularly difficult during a siege as in Sarajevo because of the almost inevitable intermingling of military forces and the civilian population."³⁰⁰

296. Dinstein, *supra* note 255, at 150 (emphasis added).

297. See 1 *Annexes to the Final Report of the Commission of Experts*, ¶ 33, U.N. Doc. S/1994/674/Add. 2 (1995).

298. See *Final Report of the Commission of Experts*, ¶ 36, U.N. Doc. S/1994/674/Annex VI.B.

299. Elliott, *supra* note 143, at 48-49.

300. *Final Report of the Commission of Experts*, para. 61, U.N. Doc. S/1994/674/Annex VI.B.

Indeed, the international sympathy generated by city attacks in favor of the Bosnian Muslims has led some commentators to view sieges and bombardments as deliberately encouraged by the Bosnian government. As David Owen, a chief architect of early peace plan proposals, charged:

In Sarajevo it became ever clearer that there were in fact two sieges of the city: one by the Bosnian Serb army, with shells, sniper fire and blockades, and the other by the Bosnian government army, with internal blockades and red tape bureaucracy which kept their own people from leaving. . . . In the propaganda war the Serbian siege aroused the sympathy of the world, and for this [the Bosnian government] needed the elderly and the children to stay. It was their most emotive weapon for bringing the Americans in to fight the war, and they never wanted it to be weakened.³⁰¹

The Commission of Experts drew similar inferences concerning the siege of Sarajevo: "It is noted in the Observations Concerning the Battle History as of July 1993 subsection that *both sides have used the city's logistics as an instrument of war against the populace to influence each other and affect the media.*"³⁰² Such allegations of media manipulation remain controversial and disputed. But their very debate is significant, as it unveils the potentially perverse consequences of basing the legitimacy of city attacks almost entirely on the actions of the attacker, the party with the least control over the placement of a city's military assets and the distribution of supplies between urban combatants and non-combatants.³⁰³

Both sides, then, used cities as conduits of terror. The Serbs used the siege and destruction of cities to spread fear throughout nearby territory. Their opponents, on the other hand, used it to spread attention to the outside world.

301. Owen, *supra* note 226, at 59-60. See also *Final Report of the Commission of Experts*, para. 75 ("Both sides have used the city's logistics as an instrument of war against the populace to influence each other and affect the media.").

302. *Final Report of the Commission of Experts*, para. 75.

303. See Danielle L. Infeld, Note, *Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm; But Is a Country Obligated To Use Precision Technology To Minimize Collateral Civilian Injury and Damage?* 26 G.W. J. INT'L L. & ECON. 109, 122-23 (1992).

A strict reading of Protocol I as expressing customary law might suggest that siege warfare is illegal, except in very limited circumstances (as where no civilians are collocated with besieged combatant forces). But siege methods have long been given leniency in customary law because they were seen as the only viable means of securing certain military objectives. While proponents of Protocol I might like to view widespread condemnation of Serb practices as an unquestioned denial of such leniency in the modern era, the evidence from the Yugoslav conflict fails to bear out this hope. The international community expressed a reluctance, even among the strongest condemners of Serb practices, to accept the wholesale rejection of siege as a legitimate instrument.

This reluctance reflects a broader dilemma: The need to carve out defensible, sovereign states inevitably creates a large discrepancy between the normative concerns of opposing armies and proponents of Protocol I. The longstanding problem of protecting cities and their civilian residents is thus compounded in the common context of ethnic strife. In newly-, or not yet-, demarcated states where minority rights are not adequately protected, some ethnic groups and their patron states are likely to perceive threats to their security.³⁰⁴ Even the Dayton Accords themselves, which have in many respects hardened geographical ethnic divisions in order to preserve a degree of peaceful stability, reflect this unfortunate reality.³⁰⁵ Despite the efforts of Western commentators and the International Tribunal, the Yugoslav conflict's legacy is unlikely to forge consensus on the principles championed by Protocol I's supporters.

VI. CONCLUSION

"Siege," writes Michael Walzer, "is the oldest form of total war."³⁰⁶ As the preceding cases show, the logic of siege warfare has reemerged time and again, though in a variety of contexts. It is indeed a "total" method of warfare, as it targets not the enemy's

304. See Tony Barber, *Learning the Bitter Lessons of Bosnia*, INDEPENDENT (London), Mar. 21, 1996, at 17.

305. See Misha Glenny, Editorial, *The Price of Peace in Bosnia*, N.Y. TIMES, Mar. 3, 1996, at E15; Kemal Kurspahic, Editorial, *Two More Years in Bosnia*, WASH. POST, Oct. 17, 1996, at A23 ("By implementing only military provisions of the Dayton accords, with a zone of separation as its major achievement, IFOR . . . has strengthened partition instead of helping the reintegration of Bosnia."); Michael O'Hanlon, Editorial, *Bosnia: Better Left Partitioned*, WASH. POST, Apr. 10, 1997, at A25.

306. MICHAEL WALZER, *JUST AND UNJUST WARS*, 160 (1977).

military forces directly but the political relationship between citizens, cities, and states to achieve ultimate strategic objectives.

In early modern Europe, terrorizing a city's population and garrison was justified, in part, as a means of pushing a city to open its gates. During the American Civil War, terror was similarly harnessed to force capitulation, though this time at the national level. As cities came to be seen less as independent territorial objectives and more as constitutive of entire nations, strategy and law shifted accordingly. In WWII, air planners expected bombing's incidental terror effects on urban centers to bring the enemy state rapidly to its knees; the legal regime proved accommodating of such practice. Though differing in application and scale, all three of these strategic paradigms aimed to compel a political act: surrender.

At a superficial level, the Yugoslav conflict marks a return to early modern European warfare, as political power to concede a territorial conqueror's objective lay again at the individual city level. But rather than exploiting the particular city-state relationship as previous campaigns had attempted, Serb planners aimed to shatter that relationship, splitting urban populations from their homes and thereby undermining the integrity of the Bosnian and Croatian states.

That the laws of siege and city-targeting have received relatively little academic and juristic attention is surprising, given that these practices are likely to continue rather than drift into obsolescence. The high degree of publicity devoted to events like the siege of Sarajevo might lead one to believe that such attacks stand out as anomalous in modern conflict. To the contrary, such events are increasingly the norm. Cities remain, as in centuries past, key centers of power, wealth, and communication.³⁰⁷ During the Soviet suppression of revolt in Chechnya, for instance, destructive military operations razed the city of Grozny. This example, like the Yugoslav case, does not merely reflect the special attributes of intrastate warfare. Had the Allied Coalition during Operation Desert Storm elected to occupy Iraq and oust Saddam Hussein's regime, the endgame would inevitably have centered on major cities such as Basra and Baghdad.

Cities have undergone vast transformations during the past five centuries. These changes, along with the relationship of the city to the modern state, have produced shift after shift in military strategy and the conduct of warfare. Despite these changes, some of

307. See Ralph Peters, *Our Soldiers, Their Cities*, 26 *PARAMETERS*, 43, 43 (1996).

them revolutionary, the third element of the triad—the principles of the law of war governing the attack of cities—has evolved far more slowly.

To proponents of Protocol I and the principles it embodies, the current legal regime may provide a degree of protection for cities and their populations not afforded in prior eras: "Protocol I accomplishes its purpose by modernizing and clarifying the 1907 Hague Regulations in response to the danger presented by modern warfare to the civilian population."³⁰⁸ The war in the former Yugoslavia should caution against such optimism. International legal developments can affect the conduct of warfare. But those striving to construct a more humane legal order must contend with many of the same pressures and dilemmas that have recurred throughout past centuries' history of cities, law, and strategy. Military and political efforts that raise the costs of inhumane practices to the perpetrators, therefore altering the strategic calculus that generates them, are more likely to produce long-term and meaningful results. Otherwise, as in countless previous conflicts, the strategic value of cities seems to overwhelm any attempt to proscribe urban targets, or methods of securing them, by resorting to classifications based on the distinctly "military" nature of targets. Tragically, cities will not soon escape the force of strategic pragmatism.

308. Solf, *supra* note 263, at 135.

